# United States Court of Appeals for the Second Circuit



**APPENDIX** 

## 75-1376

P/5

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1376

UNITED STATES OF AMERICA.

Appellant,

DOMINIC TORTORELLO,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

#### APPENDIX FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

of America.



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D. C. Form No. 10				THE RESERVE SHEET AND ADDRESS OF THE PARTY O	ATTORNEYS	00	
THE UNITED STATES			For U. S.:				
				Frank H. Whol, AUSA.			
1. FRANK 2. DOMIN	HOFFMAN IC TORTORELLO						
				For Defendant JOSEPH P 2488 Gran Bronx, N	. CAROZZA	ırse	
		7					
01) STAT	ISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.	
J.S. 2 maile	d	Clerk			3		
J.S. 3 maile	ed	Marshal					
Violation		Docket fee					
Title 18							
Sec. 231							
property	tation of stole	4					
( One	e Count)						
DATE			PRCCEEDINGS				
7-23-75	Filed indict						
8-4-75	Both defts.(atty. present) Plead not guilty. Motions returnable in 10 days. Bail as to both defts. \$20,000. P.R.B co-signed by spouses and recured by \$2,000. cash. One week to post bail. Case assigned to Judge Mac Mahon for all purposes. Stewart, J.						
8-5-75	BOTH DEFTS: Fill	FOTH DEFTS: Filed Notice of Appearance of Atty, Joseph F. Carrozza, 2488 Grand Concourse, Bronx, NY Tel# 733-3939.					
8-5-75	Cash Clerk	Filed Appearance Bon - Name of Surety Car	nd in the sum colyn Hofferma	of \$20,000. sec n. Receipt #558	gured by \$2	.000.	
8-5-75	DOMINICK TORTO	PELLA- Piled Appearar -Clerk - Name of Sure	nce Bond in th	e sum of 220.00 Tortorella. Re	00. securate #55	1 by 332.	
8-14-75	BOTH DEFT'S F the Indictment	32.000. CashClerk - Name of Surety: Rosemarie Tortorella. Receipt #55832.  BOTH DENT'S Filed Deft's Notice of Motion & Affdyt for an order dismissing the Indictment on the gorunds that the Defts have been deprived of a speedy					
	Trial.						

Govt's affdvt in opposition to Deft's motion to Dismics and Motion to Suppress.  Govt's Memorandum of Law.  EFT'S= Filed MFMO ENDORSEMENT on Deft's Affdvt & Notice of Motion for an order sing the Indictment and suppressing any evidence wrongfully suized from the Motion to dismiss the Indictment is DENTED. The affdvts in support of Deft's as to supress statements and evidence raise issues of fact which cannot be red without hearings. Accordingly, we reserve decision on these motions until muclusion of hearings to be held on August 28, 1975, at 10:00 AM, in Room 519.  Action are directed to have all of their witnesses present at that time. SO  EDMacMAHON, J. (m/n 8-25-75.  Ression hearing concluded. Suppressed all evidence sized & statements made on defore 30 April 1973MacMAHON, J.  DEET'S Filed MEMO ENDORSEMENT on Deft's Notice of Motion for an order dismissing and the statement, etc. filed 8-14-75. Motion is Granted in Part and Denied in Part. SO  EDMacMAHON, J. (m/n)  transcript of record of proceedings, dated August 27, 1975
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ED MacMAHON I (m/n)
transport of record of promodings dated August 27 1975
DEFTS=Filed Covt's motion for reargument, out of time. of Court's decision of 27-75. granting defts' motion to suppressret 10-3-75 at 2:15PM.
Defts=Filed Covt's memo of law in support of its motion for reargument.
Govt's Certification Pur to 18 U.S.C. 3731.
DEPT'S= Filed Cov'ts Notice of Appeal from the order entered 9-3-75, granting ion by the Deft's to suppress approximately 302 cases of coffee seized as aband. (Mailed copies)
Cov't's Memorandum of Law.
Deft's (both) Memorandum of Law.
DEFT'S= Filed notice that the record on Appeal has been certified and transmitted e U.S. Court of Appeals for the 2nd Circuit.
ranscript of record of proceedings, dated 8-26-75.
DEFT'S= Filed MEMORANDEM #43399 in reference to Govt's motion for rearguement 10-2-75. Accordingly, the government's motion to reargue this court's decision 18-23-75, granting Deft's motion to suppress certain evidence, is DENIMD as mely. SO ORDEREDMacMAHON, J. (m/n)(11-17-75)

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(Case called.)

THE COURT: All right, proceed.

MR. CARROZZA: Judge, I have one possible witness, other than defendants, I would like to exclude, please.

THE COURT: Surely.

MR. GARNETT: Your Honor, before we proceed I want to advise the court that I am moving to sever the trials of Hoffman and Tortorello based on a statement given by Hoffman implicating as co-defendant Tortorello. I have marked it as Government's Exhibit 10, and I would like to have the court bear it in mind during the course of the testimony of the agent this morning.

THE COURT: There is no way you can redact the statement, Mr. Garnett, so we would not have to go to two trials?

MR. GARNETT: I don't believe so, your Honor. That's why I would like to pass it up to the court, if I might.

THE COURT: How does that interfere with the suppression hearing? There is no jury here.

MR. GARHETT: In no way, your Honor.

I want to give the court advance notice.

OUTLIERN DISTRICT COURT REPORTERS US COURTHOUSE

Q Officer Palm, you indicated you were a

police officer. Out of what precinct are you assigned?

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1	hpa Palm-direct 4
2	A 62nd Precinct.
. 3	Q I direct your attention to April 25, 1973.
4	Were you working that day out of that precinct?
5	A Yes, I was.
6	Q I direct your attention specifically to
7	approximately 10:30 that evening. Where were you
8	located?
9	A 20th Avenus and 86th Street.
10	THE COURT: I am sorry. I missed the
11	date. What's the date.
12	MR. GARNETT: April 25, 1973.
13	Q What happened at that intersection?
14	Λ I observed a truck coming down 20th Avenue,
15	make a right turn onto 86th Street in an erratic manner.
16	MR. CARROZZA: I object to the characteri-
17	zation, if your Honor please.
18	THE COURT: Sustained. Strike it
19	out.
20	. Q Precisely describe what happened.
21	A I saw a truck make a right turn and it almost
22	hit the el pillar on 86th Street.
23	Q What did you do?
24	THE COURT: Almost hit the what?
25	THE WITNESS: There is an elevated line,

1	hpa Palm-direct 5
2	el pillars, on 86th Street, steel pillars.
3	Q What did you do?
4	A I then followed the vehicle to the next
5	traffic light, which was 19th Avenue, and pulled along-
6	side it. I identified myself as a police officer
7	and told him to pull over, at which time he did,
8	approximately one block away he stopped.
9	Q Continue.
10	A It was 18th Avenue 86th Street and 18th
11	Avenue.
12	I then approached the driver of the truck
13	and asked him for his license and registration, at
14	which time he said he had a license but no registration
15	I asked him for
16	Q Did he have a driver's license or
17	A I believe it was a permit.
18	Ω And he was the driver of this truck?
19	A Yes, he was.
20 .	Q What happened next?
21	A I then asked him for the rental agreement
22	on the truck and he said he didn't have it, he borrowed
23	the truck from a friend.
24	Q Did he say who that friend was?

No, he didn't.

4	A. 6 :
1	hpa Palm-direct 6
2	Q What happened next?
3	A At this time I asked him what he had in the
4	truck, and he stated cases of coffee, at which time
5	I said, "Do you have a bill of lading for them?"
6	He said, "No."
7	I asked him where he got the coffee and he
8	said he bought it from a fellow in the Borough of Man-
0	hattan.
10	Ω Go ahead.
11	A At this time I asked him if he would open
12	the back of the truck, and he did.
13	Q Did you ask him or did you tell him?
14	A No, I asked him, and he did, which was un-
15	locked.
16	Q And what did you observe?
17	A Cases of Maxwell House Coffee in the back.
18	Ω What happened next?
19	A At that time I transported him to the 62nd
20	Frecinct for investigation.
21	O Did you advise him at that time that he
2	was under arrest?
2	A No, I did not.
	. But in fairness he could not have left

the scene if he wanted to?

1 hpa Palm-direct 2 I read them their rights and proceeded with 3 the arrest procedure. THE COURT: What do you mean, you read 4 5 them their rights? What did you tell them? 6 THE WITNESS: Excuse me, your Honor. 7 THE COURT: What did you tell them? 8 THE WITNESS: I advised them they are 9 under arrest and gave them their rights. 10 THE COURT: You didn't give them any 11 The Constitution gives them their rights. rights. 12 What did you tell them? 13 THE WITNESS: That have the right to remain 14 silent, that they could have a lawyer, they don't have 15 to say anything without a lawyer. 16 I don't know verbatim, your Honor. I read 17 it off a card that the Police Department --18 THE COURT: Do you have the card? 19 THE WITNESS: I don't believe I have it. 20 THE COURT: Then I have no proof that 21 he gave him the Miranda warnings. 22 MR. GARNETT: I have no further ques-23 tions of this witness, your Honor.

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....

CROSS EXAMINATION

BY MR. CARROZZA:

Q Officer Palm, sir, do you remember testifying in the Criminal Court, County of Kings, on July 26, 1973, at a preliminary hearing --

MR. GARNETT: I would object to that,
your Honor, on the ground it is irrelevant to the issue
at hand involving this officer and advising them of
their rights at the time of their arrest.

THE COURT: Overruled on that ground, but you must confront the witness before you him with something that you claim is inconsistent.

MR. CARROZZA: All I want to do is lay the foundation.

THE COURT: Lay the foundation with a question.

Q Officer Palm, you just testified on direct examination that you had a conversation with this defendant at 86th Street and 21st Avenue, is that correct?

A 86th Street and 18th Avenue. I first observed him on 20th and 86th Street.

Q At that time the defendant told you that there was coffee in the truck, is that correct?

A That's correct.

THE WITNESS: Yes, he told me but I didn't

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

THE WITNESS: I believe it said "Avis"

truck that will indicate it was an Avis truck?

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Could you repeat that, please.

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Λ

THE COURT: Were you aware there was coffee in that truck before you made the defendant Tortorello open the truck?

THE WITNESS: No.

- Officer, you never testified in the Criminal Court concerning the vehicle almost hitting a pillar, correct?
  - A I don't recall whether I testified to that.
- O Do you remember testifying in the Criminal Court whether the defendant did not have a chauffeur's license or a license to drive that truck?

A I don't recall, counsel. I stated before
I believe he had a permit.

Q And, officer, did you ever issue any traffic violations or summonses to the defendant Tortorello or anyone else driving that vehicle that night?

A No. I did not.

MR. CARROZZA: Judge, I have the minutes of that hearing, which are not very lengthy. Rather than read them, I would offer them, Judge. I have made them part of my moving papers and I believe if there is anything inconsistent, the court can decide that.

THE COURT: What is in there I should

1	hpa Palm-cross 14
2	know about. It seems to me if it is pertinent to
3	this, you can read it into the record so that I have
4	it all in one place.
5	MR. CARROZZA: All right.
6	Q Officer, do you remember this question
7	being put to you and you making this answer I am
8	reading from page 4, at the bottom of the page:
9	"Q Was it entirely enclosed or were there any
10	. windows on the truck?
11	"A No, it was enclosed"?
12	Do you remember that question being put to
13	you and you making that answer?
14	A I don't recall but the truck was enclosed.
15	Q "Q Enclosed. When for the first time
16	that you could tell that there was anything inside the
17	truck?"
18	And then there is an objection.
19	MR. CARNETT: Why don't you read the
20	objection.
21	THE COURT: Mr. Carrozza, what is the
22	purpose of this?
23	MR. CARROZZA: I am attempting to show
24	there is an inconsistency.
25	THE COURT: I told you, and this is the

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2	2 LESTER HAY, JR.,	called as a
3	witness by the government, being	g first duly
4	sworn, testified as follows:	,
5	5 DIRECT EXAMINATION	

#### BY MR. GARNETT:

- o Mr. Hay, how are you employed?
- A Special agent for the FBI, assigned to the New York City office.
  - Q How long have you been so employed?
  - A Approximately four and a half years.
    - THE COURT: Please keep your voice up.
- Q I direct your attention to April 26, 1973.

  Did there come a time when you interviewed Dominic

  Tortorello and Frank Hoffman at the Brooklyn House of

  Detention?
  - A Yes.
  - Q What happened?
- A On that day I received a radio call from our office and it advised me that Dominic Tortorello -
  MR. CARROZZA: Objection to what it ad-
- THE COURT: Overruled. What did you
- 24 | learn?

vised him.

A I was advised that Dominic Tortorello and

Frank Hoffman had been arrested by the New York City
Police Department and were presently at the Brooklyn
House of Detention on Schermerhorn Street.

THE COURT: All right, proceed.

- Q At the House of Detention did you interview them?
  - A Yes, I did.
- Q Would you tell us what happened when you entered the House of Detention?

A I had Patrolman Palm's name and I asked for Patrolman Palm, located him. He advised me that he had arrested the two. I said I would like to speak to them. He said to check with the assistant district attorney on duty, which I did. The assistant district attorney said he had no objections.

I went downstairs to the detention center in the basement and interviewed the two individuals.

Q Let's talk about that interview.

How was it conducted, and what happened first when you went into the detention area?

A I spoke to the officer in charge there and gave him the two names of the people I would like to speak to. He said he agreed to let me speak to them. There was a row of desks in the center of that room.

The officer brought the two individuals to the desk.

I asked one to sit down, I believe it was Mr. Tortorello,
and then I asked Mr. Hoffman if he would go down the
row away, I would like to speak to Mr. Tortorello alone.

0 What happened?

A I identified myself as an agent and said

I would like to speak to him and gave him the purpose

of the interview concerning the coffee.

O With whom did you speak --

THE COURT: Don't tell me you gave him the purpose of the interview. Tell me what you told him.

A I said my name was Lester Hay, "I'm an agent of the FBI. I would like to talk to you concerning your arrest and the coffee that you were arrested -- that was on the truck 'n which you were arrested."

- Q What happened?
- A Then I advised him of his rights.

THE COURT: What did you tell him?

THE WITNESS: We have a form entitled "Interrogation, Advice of Rights."

didn't sk you if you had a form. What did you

understood hi rights and he signed the form.

1	hpa	Hay-direct 20
2	. Ω	At what time did you start advising him of
3	his rights?	
4	A	1:32 p.m.
5	Q	What time did you finish?
6	À	1:35 p.m.
7	.Ω	He executed this?
8	A	Yes.
9		MR. GARNETT: I offer this in evidence.
10		THE COURT: Received.
11	Ω	Did there come a time when you interviewed
12	Mr. Tortore	110?
13	A	That was Mr. Tortorello.
14	Ω	You interviewed Mr. Tortorello first?
15	Λ	Yes.
16	Q	Did there come a time you interviewed Mr.
17	Hoffman?	
18	Λ	Yes.
19	Ω	What did you do in conducting that inter-
20	view?	
21	Λ	I asked the two gentlemen if they would
22	change plac	es so I could speak to Mr. Hoffman alone.
23	I also advi	sed him of my identity, the purpose that I
24	wished to s	peak to him concerning his arrest with the
25	stolen coff	ee or with coffee, and I again

Hay-direct

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THE COURT: Did you say stolen coffee?

THE WITNESS: I said I would like to interview him concerning his arrest and the coffee on

the truck.

THE COURT: You didn't describe it as stolen coffee?

THE WITNESS: I don't remember.

I show you what has --

THE COURT: Had you talked with the officer, Officer Palm, before you talked with either of the defendants?

THE WITHESS: Yes, sir.

THE COURT: Did you talk to Palm about

the coffee?

THE WITNESS: Yes.

THE COURT: What did he say about the coffee?

THE WITNESS: He said, he told me, he explained the circumstances of the arrest, that he had stopped the individuals, he had asked what was in the back of the truck; and he said there was Maxwell House Coffee on the truck. He had spoken, I believe, to a Mr. Rodell in New Jersey. This would be from National Greight, the carrier who hauled the coffee.

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THE COURT: Received.

(Government's Exhibit 2 was received in evidence.)

I direct your attention to April 30, 1973.

Did there come a time when you went to 2258 Hermany Avenue in the Bronx?

- A Yes.
- Q What happened at that location?

A Agent Tom Armstrong and I and also Agents

Bill Gallagher and Larry Frizzoli went to the house.

Agent Armstrong and myself went to the front door and rang the bell. We were led inside, I believe, by

Mrs. Hoffman. We stood just inside the door and identified ourselves as agents and said, "We would like to speak to Frank Hoffman."

THE COURT: Before you go on with this.

You are a little ahead of me. How did you get there?

What did you learn from the interview, if anything, from either of these defendants --

MR. GARNETT: Your Honor, I thought the issue was whether these defendants had been properly advised f their rights and whether there was some fallibility of the advice of rights and any statements they did make would be excludable.

The substance of those conversations I thought was not relevant to this proceeding at this time.

THE COURT: What do you say? I didn't

2 understand it.

MR. CARROZZA: Judge, I thought they would be relevant because I asked the U. S. attorney to give me a copy of any statements that might be testified to.

THE COURT: That is another matter.

That may be relevant on trial. Is it relevant to the suppression hearing? What are you trying to suppress, the statements they made?

MR. CARROZZA: Plus the property taken from the Hermany Avenue address.

THE COURT: What is your basis for suppressing the statements?

MR. CARROZZA: Judge, the basis of suppressing the statements was originally on the ground there was no waiver. I was not apprised of these waivers until after my motion was made.

THE COURT: Now you are apprised. Do you still move to suppress the statements?

MR. CARROZZA: I move to suppress them,

Judge, on the grounds that the government on the 30th,

the statements which might be dangerous -- I don't know

what was said -- should have had a warrant at that

time. Had they had a warrant, then of course there may

have been ground for arrest.

THE COURT: They didn't arrest anything.

MR. CARROZZA: No, nor did they have a search warrant for that house, which I contend is all part and parcel of the investigation, interrogation of these two defendants.

THE COURT: Wait a minute, Mr. Carrozza, you are losing me.

What is the basis for suppressing statements made to the FBI? What is the basis?

MR. CARROZZA: The basis for the suppression, Judge, is the fact that these defendants had not been adequately apprised of their rights.

That was my initial --

THE COURT: That has been shown not to be the fact.

MR. CARROZZA: Until I cross examine Agent Hay, Judge, all I know is I have a signed statement here.

I don't know under what pretext it was signed.

THE COURT: I agree with you, Mr. Carrozza.

What was said at this point is immaterial.

BY MR. GARNETT:

Q I direct your attention again to April 30th at the Hermany Avenue address in the Bronx. You have

just testified that you were led into the hallway of that house by Mrs. Hoffman.

- A Yes.
- 0 What happened next?

A We said we would like to speak to Frank

Hoffman. She went and got Mr. Hoffman and we all

went into the kitchen and sat down at the kitchen table.

At that point, again, I advised him of my identity and Agent's Armstrong's identity, and that we were there because we had information that some more coffee was located at their house.

Before any questions, I again took out another form and read his rights, and he told me that he understood his rights. He didn't sign this particular form.

Q I show you what has been marked as Government's Exhibit 5 for identification and ask you if you can identify it.

A Yes. It is the copy of the rights form that I furnished Mr. Hoffman on that day.

Q What time did you begin advising him of his rights?

- A 10:14 a.m.
- Q What time did you finish?

Hay-direct

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A	10:17	a o ill o

- O You said he didn't execute th is?
- A He did not.

MR. GARNETT: The government offers Exhi-

bit 5.

AR. CARROZZA: I have no objection.

(Government's Exhibit 5 was received in

evidence.)

Q What happened next?

We interviewed Mr. Hoffman and then we said we would like to search the house for additional coffee. I had another form, a voluntary-consent-to-search form, which I turned to Mr. Hoffman and advised him that he had a constitutional right to refuse a search in the absence of a search warrant and that he could consult an attorney before he signed it.

Q I show you Government's Exhibit 7 for identification and ask you if you can identify it.

A Yes. That's a copy of the consent-tosearch form that I gave Mr. Noffman and that he signed.

MR. GARNETT: The government offers 7 into evidence.

MR. CARROZZA: No objection.

THE COURT: Received.

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(Government's Exhibit 7 was received in evidence.)

Q What happened next?

Then the agents and I, we searched the ground floor apartment for coffee. That involved looking in, I believe, the dining room which was adjacent to the kitchen and a room in the back of the house.

I believe it was a bedroom.

- O Did you find any coffee?
- A No.
- Q What happened next?

A Then we went outside and in the center of the garage of a three-car garage in back of the house we found approximately 60 cartons of coffee.

Q I show you Government's Exhibit 4 for identification and ask you if you can identify it.

A Yes. This is a photograph of threecar garage in back of Mr. Hoffman's house.

- O In which garage was the coffee located?
- A The coffee was in the center garage.
- Q Would you describe that center garage?
- A The center garage -- it's a three-car garage. The doors for each section are equal. There are windows in the doors of the garage. The doors

access to the basement.

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He told us that he didn't load any coffee

Q What else did he tell you?

Hay-	di	ir	e	C	t
------	----	----	---	---	---

into the basement.

Q What happened next?

A Then either Mr. -- I don't recall which one but either Mr. Hoffman or his wife called Mr. Tortorello. When he was on the phone I spoke to him. I had known him from before. I said, "We are over here looking for more coffee. We t hink you should come over."

O Continue.

A He subsequently did come over. As he was coming in the house, we wanted to keep the two separated while we talked to them and we put Mr. Tortorello in one of our cars and myself, Bill Gallagher anr Tom Armstrong got in the car with Mr. Tortorello and interviewed him.

Q You say Mr. Tortorello got in the car with you. Did you order him to get in the car with you?

A We said, "Why don't we sit in the car."

Q I show you Government's Exhibit 6 for identification and ask you if you can identify that.

A Yes. That is another advice-of-rights form that I read, from which I read Mr. Tortorello his rights and gave him the form to read.

O This is on April 30th?

A Yes.

31 Hay-direct 1 hpa What time did you begin advising him of his 2 3 rights? 11:15 a.m. 4 A What time did you finish? 5 6 11:20 a.m. MR. GARNETT: The government offers 6,in 7 8 evidence. 9 Received. THE COURT: (Government's Exhibit 6 was received in 10 11 evidence.) 12 What happened next? 13 14 15

Then we explained that we had information that there was some more coffee in his house. We said, "We were told by Mr. Hoffman he didn't have access to the basement and that you would have access to the basement." We said, "We would like to look in the basement."

At that time Mr. Tortorello said, "Fine." I believe he started to get out of the car.

I told him, "Just a minute. You have a right to refuse a search in the absence of a search warrant and you may consult an attorney."

> This is before he got out of the car? Q

Yes.

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# Hay-direct

Q I show you Government's Exhibit 8 for identification and ask you to identify it.

.A That's a copy of the consent-to-search form that I gave Mr. Tortorello.

Q Did he execute that form?

A Yes.

hpa

MR.GARNETT: The government offers 8 in evidence.

MR. CARROZZA: No objection, Judge.

(Government's Exhibit 8 was received in evidence.)

What happened next?

A Then we said, "Please escort us to the basement," and he opened the door and in the basement were approximately 250 cartons of the coffee.

Q I direct your attention to May 18, 1973.

Did there come a time when you made that telephone call to Mr. Tortorello?

A Yes.

Ω What happened?

A We said we would like him to come to the office, we would like to speak to him again on this matter of the coffee.

Q What did he say?

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a	Hay-direct

A I don't recall the exact wording of what he said. He did come to the office though on May 18th.

O As a result of the conversation you had with him on the phone, did you subsequently receive a call from Mr. Carrozza?

A Yes.

Q Subsequent to the call from Mr. Carrozza, did you again talk to Mr. Tortorello?

A I don't know after the call from Mr. Carrozza.

Q Did Mr. Tortorello then come to your office?

A Yes.

O I show you what has been marked as Government's Exhibit 9 for identification and ask you if you can identify that.

A Yes. That's a copy of a voluntary appearance advice-of-rights form that I furnished Mr. Tortorello.

Q "Voluntary appearance" meaning what?

A He came in to our office voluntarily. He was not arrested

Q Did he execute this form?

A Yes.

MR. GARNETT: The government offers 9 into evidence.

(Government's	Exhibit	9	was	received	in
evidence.)					

- Q I direct your attention to September 11,

  1973. Did there come a time when you again went to
  the Hermany Avenue address in the Bronx?
  - A Yes.
  - Q Did you have a conversation with Mr. Hoffman?
  - A Yes,
- Q Did you advise him of his rights at that time?
  - A I did not.

MR. GARNETT: Your Honor, at this time

I make reference to the government's motion to seber,

based on the interview of Mr. Hoffman at that time.

Q I show you Government's Exhibit 10, marked for identification, and ask you if you can identify that.

A Yes. That's an FD-302, the results of the interview on September 11th with Mr. Hoffman.

- Q What happened during that interview?
- A Mr. Hoffman told us that Mr. Tortorello had previously stated words to the effect "You know this coffee ishot."
  - Q When did he say Mr. Tortorello told him

1	hpa Hay-direct-cross 35
2	A That would be in the truck, I believe.
3	Q "In the truck" meaning the truck, the night
4	they were arrested on April 25th?
5	MR. CARROZZA: Objection to "meaning."
6	Ω The night they were on the truck, do you
7	know what night that was?
8	A I don't recall.
9	MR. CARROZZA: Same objection, Judge.
10	THE COURT: Overruled.
11	MR. GARNETT: The government offers 10
12	into evidence.
13	(Government's Exhibit 10 was received in
14	evidence.)
15	MR. GARNETT: I have no further questions
16	of this witness.
17	CROSS EXAMINATION
18	BY MR. CARROZZA:
19	Q Agent Hay, if you will, let's start with Govern-
20	ment's Exhibit 10. That was a report of a statement
21	or an interview made by you with IIr. Hoffman on September
22	11, 1973, correct?
23	
24	Ω At that time you say that Mr. Hoffman did

not sign a waiver, is that correct?

1	hpa	Hay-cross 3	
2	A	That's correct.	
3	Ω	By the way, when did you mal : this re	port,
4	Exhibit 10	in evidence? Do you remember the dat	e you
5	made the re	port?	
6	А	May I see the exhibit.	
7		(Document handed to witness.)	)
8	А	It was dictated on September 16, 1973	•
9	Ω.	And I assume it wasn't transcribed un	til
10	the 21st, i	f that date is correct, is that so?	
11	Α	That's correct.	
2	Ω	Did you make any notes of the convers	ation
13	you had with	h Mr. Hoffman on the 11th?	
14	A	Yes, sir.	
15	Ω	Did you make those notes while you we	re inter
16	viewing him	?	
17	Λ	Yes, sir.	
18	Q	Did you have them in question-and-ans	wer
19	form?		
20	. ν	No.	
21	Q	Do you still have your notes?	
22	Λ	No.	
23	0	I assume you destroyed them?	
24	λ	Yes. After the interview is dictat	ed and
25	received bac	ck from the stenographer and it is cor	rect,

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hpa		Hay-cross					
the	spelling	and	stuff,	I	destroy	the	notes.

- At that time when you questioned Mr. Hoffman there was another agent present, is that correct?
  - That's correct.
- Did he participate in the interview of Mr. Hoffman?
  - He was a witness. He said in the --Λ No.
  - He didn't ask any questions? 0
  - Not that I remember.
- Let's go back, if you will, to the 30th of April, 1973, and I am referring to Government's Exhibit 7. That was the consent in the absence of a search warrant to search the Hermany Avenue address, 2258 to be specific, is that correct?
  - That's correct.
  - Hermany Avenue, that address is a two-family house is it not, sir?
    - Yes, sir.
  - Does your consent to search in any way restrict that search, namely, to the apartment in which Mr. Hoffman resided?
    - No.
  - By the same token, it did not consent to have the yard searched, did it?

is that correct?

Hay-cross

A	Ile	didn't	sign	it.

- Q By the way, am I correct in assuming that it took you approximately three minutes in which to read him these rights, is that correct?
  - A That's correct.
- Q And ask him whether he understood them and whether he wished to sign them, is that correct?
  - A That's correct.
- Q Agent Hay, when you first went to that apartment that morning, do you remember what time it was?
- A It would have been before 10:14. I don't remember the exact time.
- Q And at that time were you alone, sir, or with other agents?
  - A I was with other agents.
  - Q How many other agents?
  - A Three other agents.
- Q And at the time you were entering the building, do you remember whether Mr. and Mrs. Hoffman were about to leave the building?
  - A They were not.
  - Q They were not.
    - Do you remember a conversation with ir.

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Hay-cross

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Hoffman and Mrs. Hoffman concerning a check that she had in her possession?

A No.

Q Do you remember making any notations concerning a workmen's compensation award check from the Wausau Employees Mutual Insurance Company?

A No.

Q You made no notation?

A I made no notation.

Q You don't remember any conversation with Mrs. Hoffman concerning going to the bank that morning?

A No.

Q Was that a Monday morning?

A I don't know.

Q There came a time when you say you requested permission from Mr. Hoffman to search the basement, is that correct?

A Correct.

Q And Mr. Hoffman told you you didn't have that authority, is that correct?

A That's correct.

Ω There came a time when a telephone call was placed to Mr. Tortorello?

A Yes, sir.

1	hpa	Hay-cross 41
2	Q	Did you place that call?
3	λ	No.
4	Ω	Who made the call, if you remember?
5	Α.	I don't remember. Either Mr. Hoffman
6	or Mrs. Hof	fman.
7	Ω	Was it at your direction or the direction
8	of any of t	he agents with you?
9	λ.	It was at my direction.
10	Ω	At your direction?
11	A	Yes, sir.
12	Q	You knew Mr. Tortorello's phone number,
13	didn't you?	
14	Λ	If I did, it would be on another interview.
15	I would ass	sume I did, yes, sir.
16	Ω	But you instructed either Mr. Hoffman or
17	Mrs. Hoffma	an to call Mr. Tortorello, is that correct?
18	A	Yes, sir.
19	Ω	And at that time you knew that Mr. Hoffman
20	and Mr. To	rtorello were brothers-in-law, did you not?
21	, A	Yes, sir.
22	O.	And do you remember approximately what time
23	that call	was put to Mr. Tortorello?
24	A	No.

Wasthat after you had searched the apart-

Q After he arrived?

A Yes, sir.

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arrived.

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Q And do you remember whether that was before or after you had questioned Mr. Tortorello in one of your vehicles?

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A That was after.

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Q It was after, not before?

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A We were outside by the house when the police officers appeared.

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Q And you don't know about what time that

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was, do you?

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Q Did you make any notation or any reports that the New York City Police were on the scene?

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A I don't know. I have to see the report.

I did take the police sergeant's name.

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 $\Omega$  Do you know whether you made any report which would use their names?

16 17

n No.

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Q When Mr. Tortorello came on the scene, you say -- withdrawn.

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In order to separate Mr. Tortorello from Mr. Hoffman you put Mr. Tortorello in one of your vehicles, is that correct?

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A Yes, sir.

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O And who else was in the vehicle other than

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you?

hpa

A That would be Agent Tom Armstrong and Agent Bill Gallagher.

Q And during the time he was in the vehicle you questioned him, correct?

A Correct.

Q Did the other agents, Agent Gallagher or Armstrong, also assist in questioning this defendant?

A Yes.

Q Did you make any notations of the questions you put to Mr. Tortorello and the answers he gave you?

A I didn't.

Q Do you know whether any of your brother agents made any notations?

A They didn't.

Q Was this conversation with Mr. Tortorello recorded?

A Yes.

Q Was there a transcript of that recording of the conversations you had with him?

A Yes.

Q How long would you say the questioning of Mr. Tortorello took?

A In the car I would say maybe 30 minutes.

#### llay-cross

Q It didn't take you 30 minutes, of course, to ask him to sign this advice of rights, did it?

A No.

And it didn't take you 30 minutes in which to ask him to search those premises, did it?

A No.

Ω At the time you asked him to search the premises you knew he wasn't the owner of the house, didn't you?

A I didn't know that.

Q Did you know whether Mr. Tortorello lived at a different address?

A Mr. Tortorello did live at a different address.

Q You had interviewed Mr. Trotorello on the night he was arrested, correct, or the morning after he was arrested, the 26th of April, correct?

A Yes, that's correct.

Q This is four days later. Can you tell us in substance what you were discussing with him for 30 minutes in that vehicle?

A The results are recored. I would have to see a copy of the transcript of the interview.

Q At the time you went to Mr. Hoffman's

a	Hay-cross

house, 2258 Hermany Avenue, did you have a search warrant, sir?

A I did not.

Ω You told Mr. Hoffman that you had information that there was more coffee in that house, correct?

A Correct.

Q Was there any discussion between you and Mr. Hoffman concerning availability of obtaining a search warrant?

A I believe -- I would say I told Mr. Hoffman that we had seen it in the garage and that we could get a search warrant if we needed one.

Q And it was after that that Mr. Hoffman agreed to have you search his apartment, is that correct?

A No. He signed the form before we did any searching whatsoever.

Q My question is --

THE COURT: Can I see that form, Exhibit

Mr. Hoffman that you could get a search warrant, did you then ask him to sign this waiver or consent to search?

A No. While he was -- while had the form

and he was reading the form, I told him at the same

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time, "You can consult an attorney before you consent.

You don't have to sign it, but if you do not, I feel

I can get a search warrant."

Q And it was after that conversation that Mr.

Hoffman signed that consent, correct?

A Yes.

THE COURT: The search consent is what

I want. I gave you the wrong exhibit.

MR. GARNETT: There were two, your Honor.

THE COURT: I want the one signed before they went out to look at the garage.

(Handed to the court.)

## BY MR. CARROZZA:

- Q Agent Hay, had you seen the coffee in the garage prior to speaking with Mr. Hoffman?
  - A Personally, I had not.
  - Q Had one of your agents?
  - A Yes.
- O So one of your agents had been on the premises and had looked into the garage before you questioned Mr. Hoffman, isn't that so?
- A Before we all four went, Agent Armstrong and myself went to the door, the other two agents went

to the rear of the house. Before we were let in the door Agent Gallagher came back and said, "It's back there."

Q Is that the information you meant when you told Mr. Hoffman, "We have information that there is more coffee in this house"?

A No.

THE COURT: Where was this coffee, inside the garage?

THE WITNESS: Yes, sir.

THE COURT: Was the garage locked?

THE WITNESS: The doors were shut. I don't know if it was locked.

THE COURT: The windows?

THE WITNESS: Again, I didn't personally see it. I think some of them were knocked out. I didn't personally see it inside the garage until we had all gone outside and were specifically looking.

THE COURT: When you went out and specifically looked in the garage, was the garage locked?

THE WITNESS: I don't remember.

THE COURT: How did you get in?

THE WITNESS: Well, the doors were opened.

I don't remember if it was locked or not.

there?

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THE WITNESS: We all went out together before the doors were opened. I don't remember if it was locked. I know we didn't open the doors before

THE COURT: You weren't the first one

THE COURT: All right.

the consent of search was signed.

BY MR. CARROZZA:

- Q Agent Hay, how far distant from the curb would you say that garage is?
  - A I would estimate 75 feet.
- Q In order to get to the garage do you have to get to the garate, do you have to walk past a driveway which runs adjacent to the house at 2258 Hermany Avenue?
  - A Yes, sir.
- Q You say you had additional information when you spoke with Mr. Hoffman concerning that coffee.

  By "additional," it is other than what your agents saw in the garage, is that correct?
  - A Yes.
  - Q And you had no search warrant, correct?
  - A We had no search warrant.
- Q There came a time then when you were questioning Mr. Tortorello. Did you tell Mr. Tortorello that one of your agents had seen coffee in the garage,

2 you had taken the coffee already?

A No. We had not taken the coffee. We did tell him that we had seen some in the garage, yes, sir.

Q During that 30-minute conversation in one your vehicles, with you and the two other officers, was there a conversation with Mr. Tortorello concerning the availability of obtaining a search warrant?

A Yes.

Q And did you tell Mr. Tortorello that "We can get a search warrant, unless you sign this"?

A Not unless he signs it. I said we had seen in the coffee in the back. "If you don't want to sign it, I feel we can get a search warrant"

Q Was there any conversation in addition to that concerning Mr. Tortorello's father and mother?

A Not that I recall.

Q Do you recall any conversation by any of your brother officers, brother agents, with Mr. Tortorello to the effect that unless he consented to this search, "Your father and mother are vulnerable"; any conversation that effect with this man?

A I don't recall that.

Q At the time you had gone up to Hermany Avenue on the 30th you had already had the benefit of a

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conversation with Patrolman Palm of the New York City
Police Department, correct?

- A Correct.
- Q And two initial interviews with these two defendants, correct?
  - A Correct.
- Q And an investigation with Avis, the people who owned Avis rent a truck, correct?
- A No. When they were stopped I did receive the information about the Avis truck and subsequently followed that up.
- Q On the 30th you were aware the truck had not been reported stolen, is that correct?
  - A That's correct.
- Q Had you the benefit of any conversation or reports concerning the taking of the coffee initially from the State of New Jersey?
  - A Yes, sir.
- Q And you had all of that information on the 30th of April, correct?
  - A Yes, sir.
- Q And you still didn't have a search warrant, isn't that so?

SOUTHERN DISTRICT COURT REPORTIRS US COURTHOUT

A That's correct.

conversation

1973?

	A 52
1	hpa Hay-cross
2	Q Agent Hay, you said you had a
3	with me some time during the move of May,
4	A I had a conversation. I made
5	made a note in the report that an individu
6	fied himself as Mr. Carrozza I had the
7	don't recall the phone number called me
8	was representing Dominic Tortorello and F
9	yes, sir.
10	Q Is that the substance of what
11	contained?
12	A That would be in substance, ye
13	Q You don't have any notes there
14	authorized you to speak with these two de
15	A I do not.

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de notes or ual who identiphone number, I e and said he rank Hoffman,

your notes

es, sir.

e that I fendants?

So when you testified earlier this morning with the consent of counsel you had had a conversation with Mr. Tortorello, that wasn't substantially accurate, was it?

I don't believe I testified that.

Did you have the consent of me or any other attorney to talk with Mr. Tortorello on May 18, 1973?

As I recall, we made the appointment with Dominic Tortorello and I believe he told me he would

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want to consult his attorney. I have a note that I received another call from a Mr. Carrozza who said he had no objections to his client being interviewed. That would be the substance of that note.

Did you ever have a conversation with the person purporting to be Mr. Carrozza who consented to have you talk with Mr. Tortorello?

- Yes. A
- You did speak with him?
- A Yes.
- Do you know the date of that conversation?
- It would be May 18th also. A
- By the way, you have nothing in writing from my office or from me, do you?
  - No, nothing in writing.
- Did my client, Mr. Tortorello or Mr. Hoffman, present any sort of note from me consenting to the interview of these two defendants?
  - No.
- And it is your position that this conversation you had with me was about three weeks after you had taken the coffee from the Hermany Avenue address, isn't that so?
  - That was May 18th, 'yes. A

1	hpa	. н	04 ay-cross		54
2	Q	That would	be about	three weeks	later, isn'
3	that so, abo				
4	A	Just about			
5	Q	Agent Hay,	I notice	that on all	the advice
6	of rights in			with the exc	
7	one, it tool	k you three	minutes:	in which to e	explain
8	these things	s to these	two defend	dants?	
9	λ	Yes.			
10	,	One took f	ive minute	es, is that	correct?
11	A	That's cor	rect.		
12	Q	The one th	at took f	ive minutes v	was subse-
13	quent to you	ur 30-minut	e conversa	ation with Mi	r. Tortorelle
14	in one of yo	our vehicle	s, correct	t?	
15	A	That's cor	rect.		
16	Q	The subjec	t of that	conversation	n you have
17	told us abou	ut concerni	ng search	warrants, co	orrect?
18	A	Correct.			
19	Q	On April 3	Oth, or th	hereabouts,	was your
20 ·	office still	on Third	Avenue, N	ew York City	?
21	A	No. It	has never	been on Thir	rd Avenue.
22	Q	I'm sorry.			
23	A	It's on 69	th Street	, at Third A	venue.

Was that the address, 69th and Third?

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Yes, sir.

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- And you are still located in the same place, is that correct?
  - Yes, 201 East 69th.
  - Just one or two other questions.

The substance of the conversation on May 30th -- withdrawn -- on April 30th with Mr. Tortorello, in the automobile, was that substantially different from the interview you had had with him on April the 26th in the Brooklyn House of Detention?

Not substantially.

MR. CARROZZA: I have no further questions, Judge.

MR. GARNETT: I have no further questions.

THE COURT: You are excused.

(Witness excused.)

MR. GARNETT: Your Honor, I have four other agents who were present at any one of these various times that the defendants were interviewed. That would be merely cumulative. I don't think we have to call them. The government would rest.

THE COURT: Do you want any of them called? MR. CARROZZA: No, Judge. I think that would do nothing but add additional record. I'm sure their testimony would substantially corroborate

2 Agent Hays.

THE COURT: All right. Does the government

rest?

MR. GARNETT: Yes, your Honor.

MR. CARROZZA: Would your Honor just give

me one minute, please.

If your Honor pleases, the defendants will call Mr. Hoffman first, please.

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FRANK HOFFMAN, a defendant, called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

### BY MR. CARROZZA:

- Q Mr. Hoffman, you live at 2058 Hermany Avenue?
- A That's correct.
- Q You are one of the defendants?
- A Yes, sir.
- Q You are the brother-in-law of Mr. Tortorello?
- A That's correct.
- Q Were you arrested along with Mr. Tortorello on or about April 25, 1973, in Kings County, which is Brooklyn?
  - A That's correct.

THE COURT: ' Keep your voice up, please.

O Mr. Hoffman, speak loud enough for me to hear, so everyone else can.

Do you remember the time when the vehicle was stopped in Brooklyn by Patrolman Palm, the first gentleman who testified here this morning?

A I do.

Q Did you hear him testify concerning the vehicle striking a pillar?

A Yes, I heard.

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Did there come a time when Patrolman Palm went

# A 59 Hoffman-direct

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to the rear of the truck?

A Yes.

Q Can you tell us what happened, if you witnessed anything at that time?

Well, he told him to open up the truck. So

we opened up the truck and as soon as he jumped up the truck,

it was dark at that time, one got a flashlight out of the

car to see what was in the truck, because it was dark,

there was no light inside. They came back off the truck

and I think, if I am correct -- I think they said there is

stolen coffee and they came off the truck and they handcuffed

us.

- Q Is that the first time you had heard the expressions "stolen coffee" used in connection with this?
  - A That's correct.
- Q Have you ever been convicted of any crime, Mr. Hoffman?
  - A No, I didn't.
  - Q You are a married man, aren't you?
  - A Yes.
- Q Mr. Hoffman, there came a time when you were brought to the police station, correct?
  - o Right.
  - Q And thereafter you were brought to the Brooklyn

	A 60 60
1	hpb-4 Hoffman-direct
2	House of Detention, were you not?
3	A That's correct.
4	Q Did there come a time when you were at the
5	Brooklyn House of Detention when you had a conversation with
6	Agent Hay?
7	A Yes, that's correct.
8	Q Do you remember Agent Hay?
9	A Yes.
10	Q The gentleman who just testified before you?
11	A Right.
12	Q At that time, Mr. Hoffman, that would be April
13	26, 1973, do you remember signing any document or documents
14	for Agent Hay?
15	A Not really. It is my signature though, but
16	I don't really remember signing it because I was in a ner-
17	vous panic at that time.
18	MR. CARROZZA: May I have Government Exhibit 2
19	please.
20	Q Mr. Hoffman, I am showing you Government Exhibi
21	2 in evidence. That is an interrogation report, the advic
22	of your rights. Is that your signature there, sir?
23	A Yes, that is.
24	Q Do you remember signing that?
25	A Not really.

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Q On that day, sir, had you signed any other papers?

A I signed a whole bunch of papers.

Q And you have never been in trouble with the police before, correct?

A Never.

Q Did Agent Hay have a conversation with you at that time?

A He spoke to me but I don't remember exactly what he went into.

Q There came a time, sir, when you went home and when did you see Agent Hay again, if youremember?

A At my house.

Q Do you remember the date, sir?

A I think it was on a Monday, the 30th, if I am correct, in the morning.

THE COURT: How old are you?

THE WITNESS: 32, your Honor.

THE COURT: How far did you go in school?

THE WITNESS: How far did I go to school? I

went to -- I didn't go to school here.

THE COURT: Wherever you went.

THE WITNESS: Well, it is equivalent to high

school.

Hoffman-direct

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THE COURT: Where?

THE WITNESS: In Europe.

- Q I am showing you Exhibit 5 in evidence, Government exhibit, do you remember seeing that document on April 30th, 1975?
  - A Very possible.
- Q By April 30th, that was the day you saw Agent Hay at your home?
  - A Yes.
- Q According to Agent Hay's testimony, you refused to sign that, is that correct?
  - A That's correct.
  - Q Do you remember refusing to sign that?
  - A I guess so. I am not positive.
- Q Do you remember signing something else on that day for Agent Hay?
  - A Yes, for a search in my house.
  - Q Was this of your house, your apartment --
  - A My apartment.
- MR. CARROZZA: Pardon me, Judge, I believe you have Government Exhibit 7.

(Handed to counsel.)

MR. CARROZZA: Thank you, sir.

Q I show you Government Exhibit 7 in evidence. Is

	A 63
1	hpb-7 Hoffman-direct
2	that the document you are referring to which you signed?
3	A Yes.
4	Q You do remember signing that?
5	A Right.
6	THE COURT: You were at the garage too?
. 7	THE WITNESS: No, your Honor.
8	THE COURT: Do you have a car?
9	THE WITNESS: Yes, but it is in the street.
10	THE COURT: Whose garage is it?
11	THE WITNESS: It is too small for that type of
12	car.
13	THE COURT: Whose garage is it?
14	THE WITNESS: My father's
15	THE COURT: Your father's
16	THE WITNESS: Father-in-law.
17	THE COURT: Does he live in the same apartment
18	with you?
19	THE WITNESS: Upstairs.
20	THE COURT: Above you?
21	THE WITNESS: Right.
22	THE COURT: In a different apartment?
23	THE WITNESS: Right.
24	Q Mr. Hoffman, in the building in which you reside

is that a two-family house, sir?

h	n	h	_	Q
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#### Hoffman-direct

- A That's correct.
  - Q Your apartment is on the first floor?
  - A Right.
  - Q Mr. Tortorello and Mrs. Tortorello live above you?
    - A Right.
    - Ω Are there separate entrances?
    - A No, one entrance.
    - Q Are there stairs going upstairs?
    - A Yes, there is stairs, right.
  - Ω About what time would you say it was that you saw
    AGent Hay that morning, April 30?

A It had to be around ten, 11:00 o'clock. I wouldn't know exactly, to pinpoint it. I know it was in the morning. That's all.

- Q At that time was your wife present with you?
- A Yes, she was.
- Q What were you doing or about to do when Agent Hay and the other agent came to your home?

A My wife was just going out to throw the garbage out, and my daughter was ready to go in the car because I had to go to the bank. She walked inthe hall, there was two agents standing in the hall. Now there is a front door leading into the hall. No one ever rang my bell or anything.

Hoffman-direct

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We didn't know there was nobody in the hall. My wife walked out, I was on the telephone at that time, and she told me the FBI was waiting for us in the hall.

So, they entered my kitchen and sat down. We were on our way to the bank because I just had a settlement for my knee, and at that time my wife says to them, "Well, I have to go to the bank."

He said, "Well, let me see the check."

So he made a notation of the check, to who I got it from and they wrote it down. I don't know what else he wrote down. I was there for about two, three hours and I went to the bank in the afternoon late. They let me go to the bank around two o'clock, just before closing time.

That I remember correctly because I lost my job and I had no means of support and that was the only thing that kept me.

- Mr. Hoffman, after you executed the consent to search your apartment, did there come a time when Dominic Tortorello, your brother-in-law, the co-defendant here, appeared?
  - Yes. We were told to call him. A
  - Do you remember who told you to call him? Q
  - One of the agents. I don't know which. A
  - About what time was that? Do you have any idea? Q

		A 66 66
1	hpb-10	Hoffman-direct
2	А	It had to be after 10:00. I guess around 10:00,
3	11:00 o'clo	ck. I do not recall the time.
4	Q	About how long after you called did Mr. Tortorello
5	appear at t	he house?
6	A	Ten, fifteen minutes at the most.
7	Q	He lives in the Bronx also?
8	A	That's correct.
9	Q	At the time he lived in the Bronx?
10	. А	That's correct.
11	Q	Had the agents removed any of the coffee from
12	the garage	before you called Dominic Tortorello?
13	A	No, they didn't.
14	Q	Did you hear Agent Hay testify that he informed
15	you that	
16	9	Yes, he told me about it.
17	Q	He also told you that he could get a search
18	warrant?	
19	. A	That's correct.
20	Q .	At the time you were reading that document you

ument you gave him permission to search your apartment?

A That's correct.

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The search of your apartment uncovered nothing, is that correct?

That's correct.

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	Q	During	the	time	they	searched	your	apartment
was	your	wife there	e?					

Hoffman-direct

Yes, she was.

Mr. Hoffman, there came a time in September -withdrawn.

Did there come another time when Agent Hay came to your home?

Yes, he did come.

- Agent Hay said that was September 11th --Q
- I do not recall the date, but I know he did come. A
- Do you remember about what time it was? 0
- No, I do not. A
- Was it in the morning, afternoon, evening? 0
- I do not recall. A
- Did you have a conversation with him at that time?
- Yes. They questioned me for a few things, A but I don't remember exactly words, what he asked me.
- Q Was there some conversation as to whether any of the coffee had been sold?
  - A No.
- Did you ever tell Agent Hay that Dominic Tortorello, your brother-in-law, had told you the stuff is hot?
  - No, I didn't.

# A 68

### hpb-12

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# Hoffman-direct

cross

- Q When for the first time did you have any idea that this coffee was hot or stolen?
  - A Soon after I was arrested. The officer told us.
- Q From that day, September 21, 1973 -- witherawn. September 11th or thereabouts, when Agent Hay saw you at your home, had you had any contact with Agent Hay or any other Government agents?
  - A No, I didn't.
- Q When was the next time you heard anything concerning this particular case?
  - A When I was subpoenaed.
  - Q Do you remember when that was?
  - A Late at night, as I was in bed.
  - Q Do you remember what month or the year?
  - A No, I don't remember the date.
  - Q This year?
    - A It was just recently.
- MR: CARROZZA: I have no further questions of this witness.
- CROSS-EXAMINATION
- BY MR. GARNETT:
  - Q Mr. Hoffman, how much education have you had?
  - A Equivalent to the American high school.
    - Q Is it safe to assume you can read and write?

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- Yes, I can. A
- And you understand what you read and write? 0
- Yes, to an extent. A
- You have seen the exhibits, have you not? 0
- Yes, I did. A
- Were you able to read those exhibits? Q
- Yes, I did.
- I direct your attention to the garage of that house at 2258 Hermany. Do you store things in that garage?
  - No, I don't.
  - You have no access to that garage?
  - No, I do not.
  - You don't go into that garage at all? 0
- Maybe once in a while but I do not store anything A in it, no.
  - You have access to it once in a while?
  - If I felt like it, yes. A
- You say there was no ring at the bell to your house or no knock of the agents at the time they came to your house?
  - That's correct. A
  - Where were you when they came to the house? 0
  - I was on my telephone in the kitchen. A
  - Where is your kitchen located? Q

There is no one else living downstairs.

Was that affidavit true?

Q

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It was.

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Do you recall signing it?

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I certainly do.

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A That's correct.

In this affidavit you made the statement, page 2 of Mr. Hoffman's affidavit, "I was therefore informed that the agents were going to search my apartment. When the search turned up no contraband they produced a document which I signed which consented to the search." Is that correct?

A Do you want me to repeat that? You lose me there.

Q Let's look at page 2 and the paragraph here. " I was therefore informed that the agents were going to search my apartment. When the search turned up no contraband, they produced a document which I signed which consented to such search."

Is that correct?

That is correct.

You signed that after they had been to the garage and found the coffee?

Yes, because he told me himself.

Q You then further say Agent Hay demanded that you sign a similar consent to search the entire house.

Hoffman-cross

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- O And you refused to do that?
- A That's correct.
- Q Isn't it a fact he asked you to see the rest
  of the house and you said that that was your father-in-law's
  apartment?
  - A That's correct.
  - Q And they were sick or ill?
  - A That's correct.
  - Q Then they said couldn't they see the basement?
  - A That's correct.
- Ω And you said you didn't have access or authority
  to the basement?
  - A That's correct.
  - Or you didn't have a key, is that correct?

    MR. CARROZZA: Did you say --
  - A It was not locked. I didn't say a key.
  - Q You told them you didn't have access?
  - A Yes.
  - Q And they didn't go in the basement at that time?
  - A That's correct.
  - O At that time.
  - A Right.
    - MR. GARNETT: I have no further questions,
- 25 your Honor.

1	hah	H 14	To all the second
	hpb	Tortorello-direct	74
2		MR. CARROZZA: I have no further question	s,
3	Judge.		
4		THE COURT: You are excused.	
5	•	MR. CARROZZA: The defense calls Mr. To	rtorello
6	DOMINI	C TORTORELLO, a defendant, o	alled
7		witness, having been first duly sworn, was	
8		estified as follows:	
9	DIRECT EXAM	MINATION	
10	BY MR. CARE	ROZZA:	İ
11	Q	Mr. Tortorello, speak good and loud, plea	Se. 30
12	I can hear.		, sc, sc
13		In April of 1973, where were you living,	sir?
14	A	1960 East Tremond Avenue.	J11 .
15	Q	Where are you residing today, sir?	-
16	A	1960 East Tremont Avenue.	
17	Q	Are you married, sir?	
18	A	Yes, sir.	
19			
20	Q	Do you have children?	
21	Α	Yes, two.	
	Q	Have you ever been in conflict with the	law other
22	than the si	tuation you found yourself in in April?	
23	A	No, sir.	
24		THE COURT: How old are you?	

THE WITNESS: 26, your Honor.

1	hph	Mantaurilla dinant
	hpb	Tortorello-direct 75
2	Q	How much education have you had, Mr. Tortorello?
3	A	Third year high school.
4	Q	You never graduated?
5	A	No, sir.
6	Q	And you are presently in business, sir?
7	A	Yes, sir.
8	Q	What kind of business?
9	A	Trucking business.
10	Q	Are you in business for yourself, a partnership,
11	corporation	?
12	А	Corporation.
13	Q	What is the name of the business?
14	A	Tortorello Trucking Company, Incorporated.
15	Q	Where is that located?
16	Α	2907 Bruckner Boulevard, Bronx, New York.
17	Q	Mr.Tortorello, you have heard Agent Hay testify?
18	А	Yes, sir.
19	Q	You heard everything he testified to?
20	Α	Yes, sir.
21	Q	I am not going to bother you with what I want
22	you to test	ify to, Mr. Tortorello, is, do you remember
23	being arres	ted on or about April 25, 1973?
24	Α	Yes, sir.
25	Q	You were stopped by Patrolman Palm, correct?

1	hpb	Tortorello-direct 76
2	A	Yes.
3	Q	And other police officers?
4	A	Yes, sir.
5	Q	Were you driving that vehicle?
6	A	Yes, sir.
7	Q	Was it an Avis rent-a-truck?
8	A	Right.
9	Q.	At that time, sir, prior to being stopped, had
10	you narrowl	y missed hitting an el pillar?
11	. А	No, sir.
12	Q	And there came a time when you were stopped,
13	got out of	the vehicle, correct?
11	A	Yes, sir.
15	Q	Did you have a conversation with Patrolman Palm?
16	A	I don't remember. It has been two and a half
17	years.	Y. Y.
18		THE COURT: You don't remember whether you even
19	talked to h	im?
20		THE WITNESS: Evidently I must have talked to
21	him.	
22		THE COURT: That is all you were asked.
23	Q	You had a conversation with him?
24	A	Right.
25	Q	Do you remember in substance what you spoke

about?

A No.

Q Did he ask you to see your license and registra-

A Yes. I showed him what I had. I had, if I remember correctly, it was the thing before you get your license. It is the permit and then after you take the road test they stamp it and it is a valid license for so many days.

Q At that time did you have anything that gave you permission to have the vehicle, a registration, rental certificate?

A I guess it was in the glove compartment, I don't know, but I told him I didn't have it.

Ω Did there come a time when you opened the truck? By that I mean the back of the truck.

A Right.

Q What brought about your opening that truck?

A The police officer told me, you know, to open up the back door, so I wentin the back and opened the back door and then in turn he jumped on the truck and he asked another officer, I think, for a flashlight. I wasn't too sure. I am not too sure.

Q There came a time thereafter when you were

1	hpb Tortorello-direct 78
2	under arrest, is that correct?
3	A Yes.
4	Q In the stationhouse?
5	A Right.
6	Q When you were stopped that evening how many
7	police officers were there?
8	A There was quite a few. Four.
9	Q Did there come a time, sir, when you were ques-
10	tioned by Agent Lester Hay for the first time?
11	A Yes, sir.
12	
	Q You remember Lester Hay, he testified here
13	earlier?
14	A Yes, sir.
15	Q Do you remember where that was?
16	A In Brooklyn Court, I think downstairs in the
17	courthouse.
18	Q Was it the House of Detention?
19	A House of Detention.
20	Q And at that time, sir, did he give you something
21	to sign? I am showing you United States Government Exhibit
22	in evidence. Would you look at that, please, sir. Is
23	that your signature?
24	A Yes, sir, it is my signature, but I don't rememb
25	signing it.

25

Q

Right.

1	hpb	Tortorello-direct 73
2	Q	On the night you were arrested, had you signed
3	other paper	rs?
4	A	Yes, sir.
5	Q	You do remember having a conversation with
6	AGent Hay,	correct?
7	A	Yes.
8	Q	And it concerned the coffee that was found in
9	the truck,	isn't that so?
10	A	Yes, sir.
11	Q	How long did that conversation last?
12	A	A couple of minutes.
13	Q	When was the next time you saw Agent Hay?
14	A	I guess it was at the house. I don't know
15	exactly wh	at date it was.
16	Q	At the house? Which house do you mean?
17	A	2258 Hermany.
18	Q	Is that house owned by you, sir?
19	A	No, sir.
20	Q	Do you know who the owner is?
21	A	Yes, my father.
22	Q	And does Mr. Hoffman live in that house?
23	A	Yes, sir.

He occupies one apartment?

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in-law.

hpb

- Q By your brother-in-law --
- A Frank.
- Q Mr. Hoffman or his wife?

A Right. And they said Lester Hay was there and evidently -- he got on the phone right after that and he said, "Dominic, would you please come over." So I hung up the phone, walked out the door and came right over.

- Q On that morning, on April 30, were you working, sir?
  - A No, I lost my job.
- Q Did you lose your job as the result of this arrest?
  - A Yes, sir.
- Q When you got over to the house on Hermany Avenue, did there come a time when you saw Agent Hay?
  - A Yes, as soon as I got out of the car.
  - Q Were other agents with him, if you know?
  - A Yes, sir.
- Q Did there come a time, sir, on that morning, when police officers from the City of New York came on the scene?
  - A Yes, sir.
  - About how long after you got there?

1	hpb	Tortorello-direct 82
2	- <b>A</b>	I would say half an hour, maybe more. I am
3	not sure.	
4	Q	How many police officers if you know, were
5	there?	
6	A	A car full.
7	Q	In uniform or not in uniform?
8	A	Not in uniform.
9	Q	From the time you got there until you saw those
10	police offi	cers, had you been having a conversation with
11	Agent Hay?	
12	A	Yes, sir.
13	Q	Where did that conversation take place?
14	A	Inside his vehicle.
15	Q	Was there anyone else in that behicle?
16	A	Yes, a couple of agents.
17	Q	FBI agents?
18	А	Right.
19	Q	Who was questioning you or talking with you?
20	Agent Hay	or the eother officers?
21	A	Mr. Hay was talking and a couple of other agents
22	you know.	
23	Q	Did you hear Agent Hay testify that the convers
24	tion you ha	ad with him in that car was recorded?
25	A	Yes. sir.

	Q	Whe	n for	the	fir	st t	ime	were	you	aware	of	the
fact	that	that	conve	rsat	ion	was	reco	orded	?			

- A A couple of minuutes ago.
- Q Can you tell us in substance what that conversation you had with Agent Hay was about?
- A Mr. Hay asked me questions in reference to the, you know, stolen merchandise and I told him I didn't know it was stolen, and he went on and on.
- Q Did he tell you that they had seen coffee in the garage?
  - A Yes.
- Q Did he tell you that he had already searched FrankHoffman's apartment?
  - A I don't remember.
- Q Was there any conversation concerning you and your father or your mother?
- A I don't remember. It has been two and a half years.
- Q Was there any conversation concerning a search warrant for the premises?
- A Yes. He says that he would get a search warrant if it was necessary.
- Q . And about how long were you talking to Agent Hay in that automobile?

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hpb

- A Three quarters of an hour.
- Q Did there come a time, sir, when you signed a document for Agent Hay?

I show you Government Exhibit 8 in evidence, Mr. Tortorello. Is that your signature, sir?

A Yes, it is my signature, but I don't remember signing it.

- Q Did there come a time when the agents went into the basement of that building?
  - A Yes, sir.
  - O They removed certain property from it, correct?
  - A Yes, sir.
- Q Will you tell the Court how the property got from the basement into a truck?
  - A We helped them.
  - Q What do you mean you helped them?
- A Me and Frank, we helped them take the merchandise out of the basement, put it outside, put it on top of one of their cars, on the hood, on the trunk, andon the roof and bring itout to a trailer that was parked on the street.
  - Q They left that day, correct, the agents?
  - A Yes, sir.
  - Q The next time you heard from Agent Hay was in

Q

I could not tell you the date, but it was late

Q

A

at night.

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Tortorello-direct

Did you have a conversation with them?

Yes. I let them in, they say down at my table A and I answered any questions they wanted.

- Concerning the same --
- The same thing, repetitious. A
- Concerning the same coffee? 0
- Right, the same. A
- From that day until you were served with a subpoena in May or June of this year, had you heard anything from the Government concerning this case?
  - No, sir. I thought it was over. A
  - Any contact with Mr. Hay? Q
  - No, sir. A
- Have you continued to live in the same house you 0 were living at?
  - Yes, sir.
- One other question, Mr. Tortorello. Do you have any interest whatsoever in that home on Hermany Avenue?
  - No, sir. A
- Do you have any authority from you? parents to have the agents search that house?
  - No, sir. A

MR. CARROZZA: No further questions.

1	hpal Tortorello-cross
2	CROSS EXAMINATION
3	BY MR. GARNETT:
4	Q Mr. Tortorello, the night that you were
5	arrested, did you have a driver's license?
6	A Well, it was the same as a driver's license.
7	Q It was a permit, wasn't it?
. 8	A It was a permit stamped as a driver's license.
9	I took a driver's test, I passed the driver's test
10	Q Fine, conceded. You had a permit. In
11	fact, the police officer's report reflects that you had
12	a permit.
13	A Yes, sir, but a permit and license
14	Q I understand. You were
15	THE COURT: Don't argue the case. Leave
16	thaet to Mr. Carrozza. He is a pro.
17	THE WITNESS: Sorry, your Honor.
18	THE COURT: Answer the question.
19	Q Did you also have the rental agreement for
20	that truck?
21	A No, sir, not that I know of.
22	Q Did the officer ask you for it?
23	A Yes, sir.
24	Q And you didn't provide it?
25	A Yes, sir.

	A 89 — 89
1	hpa Tortorello-cross
2	Q Did the officer ask you what was in the
3	truck?
4	A Yes, sir.
5	Q You told him it was coffee?
6 .	A To tell you the truth, I don't recall the
7	conversation.
8	THE COURT: Did you tell him what was in
9	the truck?
10	THE WITNESS: I don't remember the conver-
11	sation.
12	THE COURT: Did he ask you what was in
13	the truck?
14	THE WITNESS: I don't remember.
15	THE COURT: You just told the assistant he
16	did. Did he ask you what
17	THE WITNESS: Maybe evidently I did say
18	there was coffee in the truck.
19	Q Did he ask you where you got the coffee?
20	A I don't remember.
21	Q Do you recall telling him you got it from
22	a guy in a bar in Manhattan?
23	A I don't remember.
24	Q Then subsequent to the conversation you had

with h im did he ask you to open the truck?

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#### Tortorello-cross

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2	. Α	Yes, sir, I opened the truck after he to	old
3 -	me to open	it.	
1	Ω	You said that there were four policemen	
5	there.	Were they dressed in uniform?	

- A No, sir.
- Q They were in --
- A Plainclothes.
- Q -- plainclothes.

Were they driving official police vehicles, with the lights, and New York Police Department on them?

- A I don't think so.
- Q Did you know they were part of the Anticrime Force?
  - A I didn't know.
- Ω You do know that policemen can stop any vehicle and ask for a registration and driver's license?

  MR. CARROZZA: Objection.

THE COURT: Sustained. It's immaterial.

It's a question of law.

Q I direct your attention to that house at 2258 Hermany Avenue. You said your father owns that house?

A Yes, sir.

# A 91

1	hpa4	Tortorello-cross
2	Q	How long has he owned that house?
3	A	About 19 years.
4	Q	Have you ever lived in that house?
5	A	Yes, sir, before I got married.
6	Q	When did you get married?
7	A	In 1972.
8	Q	When?
9	A	The exact August.
0	Q	About a year before the agents were
1	A	August, '72.
2	Q	From August, '72 to April of '73 you were
13	not living	in that house?
14	A	No, sir.
15	Q	But you had spent a good portion of your
16	life in tha	at house?
17	A	Yes, sir.
18	Q	And you had access to that house all the
19	time?	
20	A	Well, I guess, no
21	Q	Do you have keys to that house?
22	A	No, sir.
23	Q	When was the last time you had keys to that
24	house?	
25	A	I gave my mother the keys the day I moved out.

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Tortorello-cross

- Q Do you knock on the door when you go to that house?
  - A Yes, sir. I knock and I walk in.
  - Q You knock and you walk in?
  - A Yes. I knock, you know -- sometimes --
- Q You still have access to that house, don't you?
- A. Yes, sir. More or less the door is locked when I get in there and I have to knock to get in.
- Q When the agents talked to you in that car that day and asked you for that consent, did you then leave the car and lead them to the basement?
  - A Yes.
  - Q Did you then open the basement?
- A The door was opened so I then took them downstairs.
  - Q Did you then open the door to the basement?
  - A Yes.
- Q In your affidavit that you signed for Mr.

  Carrozza you stated that the agents insisted that you and your brother-in-law help them unload that coffee.

  Isn't it a fact they started unloading the coffee from the basement --
  - A No, sir.
  - Q -- and then advised you you should help them

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1	hpa6		93 ortorello	o-cross	
2	to shorten t	he time to	remove	the cases?	
3	Α	No, sir.			
4			did the	y ask you to	help?
5		They asked	me to h	elp right aft	er
6	Q	They asked	you to	help?	
7				I want you tw	o guys to
8	help."				
9		MR. GARNET	T: I	have no furth	ner questions.
10	. REDIRECT EXA	MINATION			
11	BY MR. CARRO	ZZA:			
12	Q	Did there	come a t	ime when you	put gloves
13	on?				
14	A	Yes, sir.			
15	. Q	Where did	the glov	es come from	?
16	A -	They went	and brow	ight them.	
17	Q	Who?			
18	λ.	The FBI.			
19		MR. CARROZ	ZA:	o further que	estions.
20		THE COURT:	You	are excused.	
21		(Witness o	excused.		
22		(Recess.)			
23		THE COURT	Pro	oceed.	
		MD CARROS	777.	The deferse c	alle Mre

Hoffman.

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CAROLIN HOFFMAN, called as a witness by defendants, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. CARROZZA:

Q Mrs. Hoffman, you are the wife of Frank Hoffman, the defendant here?

A Yes.

Q The sister of Dominic Tortorello?

A Yes.

Q You live at 2258 Harmany Avenue in the Bronx?

A Yes,

THE COURT: Please keep your voice up.

Q Do you remember a day in the latter part of April when you happened to see federal agents at your home?

A Yes, I do.

Q The date I am supplying to you is April 30th.

Does that date ring a bell in any way?

A Yes.

Q What day of the week was it?

A It was a Monday.

Q When for the first time did you see the federal agents?

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#### C. Hoffman-direct

A I was just coming out of my door, we were leaving to go to the bank, and I was going to throw out the garbage and they were in my vestibule, in my -- you know, as I come out of my door there is two other hallways and they came through the front door.

Q What you are saying is, the door of your apartment leads into a vestibule?

A Yes.

Q And there is another door which then leads to the outer door?

A Yes.

Q Where were the agents when you saw them?

A After they came from the door, they were standing there. I asked him, "Can I help you?"

THE COURT: How many apartments are there in this building?

THE WITNESS: Two.

THE COURT: There is a common hallway entrance?

THE WITNESS: Yes.

THE COURT: One is upstairs and one

downstairs?

THE WITNESS: No, sir. As you are walking in there is two big hallways, there is a

1	hpa9 C. Hoffman-direct
2	front door and two big hallways, and then you walk into
3	one, that's where my door is, and then you go to the
4	other and that's where the other apartment is.
5	THE COURT: Where were they, in the common
6	hallway or inside your hallway?
7	THE WITNESS: In the common hallway.
8	THE COURT: Is there a door from that
9	common hallway into your house?
10	THE WITNESS: Yes, there is.
11	THE COURT: All right.
12	Q How many agents were there, if you remember?
13	A Three or four.
14	THE COURT: How did you come in the door?
15	THE WITNESS: I was going to throw out
16	the garbage. I was just going to leave, we were going
17	to
18	THE COURT: And you saw them in the common
19	hallway?
20	THE WITNESS: Yes, I did.
21	Q Did they identify themselves to you?
22	A Yes, they did.
23	Q And thereafter what happened, after they

Frank had saw them and they came into our A

identified themselves?

hpa10

#### C. Hoffman-direct

apartment, they did, and I guess they asked, you know, to look around and they gave Frank a paper to sign, they did, and I told them I had to leave to go to the bank due that my husband was out of work. I had got a check from compensation, he had an injury to his leg, he had, and they says -- I asked if I can go to the bank and put it in so I could help in the checking account, and at that time they didn't let us go yet, but he took the check --

- Q Who took the check?
- A The one in charge, Lester May.
- O He took the check?
- A Yes. And he made a notation on the pad, he made, because he said that"I will find out anyway," so --
- Q Did you have any other conversation with the agents?
  - A No, I didn't.
- Q Did there come a time when your brother Dominic came to the house?
  - A Yes.
- Q A phone call was made from your home, correct, to summon Dominic?
  - A Yes.

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1	hpal1	C. Hoffman-direct
2		id you call or did Frank Call?
		: - 11%
3	AI	called.
4	Q A	nd you spoke to Dominic?
5	A Y	es, I did.
6	Q A	but how long after you spoke to Dominic
7	did he come t	o the house?
8	A I	would say no more than about 10 or 15
9	minutes.	
10	. м	R. CARROZZA: I have no further ques-
11	tions.	
12	м	R. GARNETT: I have no questions of this
13	witness, your	Honor.
14	T	HE COURT: When you saw them in the
15	hallway what	did they say to you, if anything?
16	T	HE WITNESS: They says, "I'm Lester Hay from
17	the FBI, we a	re," and I says to him, "Yes," I says, "Hold
18	on a second,"	and I went to get my husband.
19	м	y door was open and my husband saw, so he
20	came right ou	t, he did, because he recognized Mr. Hay,
21	he did, and f	rom then on we went into the apartment.
22	T	HE COURT: The door was open?
23	T	HE WITNESS: Yes.
24	Т	HE COURT: Did your husband say, "Come
25	on in, come i	n"?

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hpa12

C. Hoffman-direct

THE WITNESS: We all went in together.

I really don't remember if they were invited, but, you know.

THE COURT: All right.

(Witness excused.)

MR. CARROZZA: That's the defendant's case on the motion, Judge.

MR. GARNETT: Your Honor, I would like to bring Agent Hay back to clear up one matter.

THE COURT: May I have the statements they took while they were interviewed in the police station.

MR. GARNETT: They were not written statements, your Honor.

THE COURT: They were not.

MR. GARNETT: It was just FBI reports, reducing to writing the summary of the interviews.

THE COURT: Let me see those reports.

Mark themin evidence for the purposes of this.

(Government's Exhibit 1) was received in evidence.)

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LESTER HAY was recalled as a witness by the government and, having been previously duly sworn, testified as follows:

THE CLERK: Let me remind you you are still under oath, sir.

BY MR. GARNETT:

DIRECT EXAMINATION

Mr. Hay, I just want to clear up one
matter. On your cross examination by Mr. Carrozza you
made a statement that the conversation you had with Mr.
Tortorello and maybe a subsequent conversation were
recorded. By that did you mean that they were recorded
on a mechanical device of some sort?

A No.

Q What did you mean?

A Recorded on paper by a notation, typed notation of the conversation.

Q In other words, there were no tape recordings of any sort in this --

A No.

MR. GARNETT: No further questions,

your Honor.

THE COURT: Who opened the garage door?

THE WITNESS: I don't remember who

# A 101

hpa

Hay-direct

opendd it, sir.

THE COURT: Did Hoffman open it?

THE WITNESS: I don't recall exactly who opened it. We didn't force it open.

THE COURT: You said, I think, that some agent went back there, saw the stuff before you ever went in the house?

MR. GARNETT: Your Honor, if I might go forward on that line of questioning.

BY MR. GARNETT:

Q I show you Government's Exhibit 4 and
I direct your attention to the center garage in that
photograph. Do you recall whether there were windows
missing from that garage door?

A I don't recall specifically whether windows were missing. What I recall is when we went out there to look, the doors were open, I paid no attention to the windows.

Ω Did any agent enter that garage before you had the consent signed by Mr. Hoffman?

A No.

MR. GARNETT: No further questions.

THE COURT: But an agent had walked back there before you had any consent?

hpa

Hay-direct

THE WITNESS: Yes, sir.

THE COURT: You are excused.

MR. CARROZZA: I have no questions, sir.

(Witness excused.)

THE COURT: All right, I will hear you at

2:15. I am sorry I can't do it now. It's taking

a little longer than expected. It better be 3 o'clock.

I have an order to show cause at 2:15. 3 o'clock,

right here.

MR. GARNETT: Your Honor, these are the

FBI 302 reports of the interviews conducted on each of

the days with the defendants (handing).

(Luncheon recess.)

THE COURT: While we are waiting here for the file, which I need, with reference to the suppression motion, which I do not need in reference to the motion based on alleged failure of the Government to grant the defendants a speedy trial, I deny that motion. The indictment is well within the statute of limitations here and there is no merit to that point at all.

There are many cases denying relief of the sort you seek where the time lapse is far greater than here.

So. I deny that motion.

This is a multi-facet motion, this motion of yours to suppress, Mr. Carrozza, and I can't approach it intelligently until we focus on what your claims are here.

The first one, as I read your papers, is that the defendants were never apprised of their rights to Miranda warnings.

Do you still press that in view of the evidence here?

MR. CARROZA: No, I obviously cannot press that.

THE COURT: All right, that's all I want to know.

Your next one is that the arrest on April 25, 1973, was without probable cause and the search and seizure of any property in the truck in which they were riding was without benefit of a search warrant or authority to search.

## A 104

There is no question there was no search warrant.

Now, tell me why you say the search and seizure of the property in the truck was illegal.

MR. CARROZZA: The reason, Judge, that the police officer's own testimony was when he stopped the vehicle, had no knowledge what was in that truck, and the search of the vehicle was at best at that point a general search. The defendant had produced a license or permit which gave him authority to drive it, which would give him no violation for any traffic rules or regulation, the mere stopping of that vehicle and ordering or at least requesting the defendant to open the truck, that he could view the contents of the truck, was in violation of the defendant's rights. I submit there was no probable cause. There was no crime committed in their presence and they had no reason to believe a crime was committed in their presence.

Assuming that the defendant had said to him that there is no coffee in that truck, that still would not give them the right to search that truck because the police admitted they did not know that that coffee was stolen until after the seizure and in all probability when they got back to the station house.

THE COURT: All right, Mr. Garnett, how do you

answer that?

MR. GARNETT: First off, your Honor, the coffee which was seized on that day is not involved in the instant indictment. I had no intention of prosecuting those defendants or going forward with this prosecution on that coffee.

Secondly, in answer to his question -
THE COURT: Wait a minute. What about that?

Does that mute your problem?

MR. CARROZZA: It doesn't, Judge, because as a result of that search --

THE COURT: You say it taints everything else?

MR. CARROZZA: Everything else follows.

MR. GARNETT: I would argue it does not, and the officer has the authority to stop and question any operator of a vehicle as to his authority to operate that vehicle either by way of a license or his just possession of it by asking for a registration. In this case, there was testimony that the officer observed the truck negotiating a turn in a reckless manner, that he stopped the truck, asked them for the identification, license and the documents showing they were entitled to drive that truck. At that time they did not produce the document. He then asked what load are you carrying.

THE COURT: What business was that of his?

MR. GARNETT: What business? He is a police officer in charge -- not in charge, assigned to the Anti-Crime Unit of that particular precinct and is --

THE COURT: You mean a cop can come up to me and say, "Have you got a license" and I say "Sure, here is my license" and he says "What is in the trunk of your car?" I would tell him to go.

MR. GARNETT: In this case, there was not -THE COURT: Is there any evidence that they
consented?

MR. GARNETT: That the defendants consented?
THE COURT: Yes.

MR. GARNETT: Certainly. There was testimony by the officer he asked what was in the back of the truck and they said coffee and he said, "Where are your papers to the coffee? and they said they had none and he asked them to open it. Concededly, they may have conceded to the authority of the officer, but Mr. Tortorello opened the rear of the truck itself.

THE COURT: Let's stay with that for a minute.

Do you want to respond to that?

MR. CARROZZA: I don't believe I do, your

Honor.

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(Recess.)

(Resumed.)

THE COURT: The Court has carefully heard and

will answer that when we come back.

reviewed the evidence and the arguments on this point, and during the luncheon recess played back the tape recording that I have of the evidence, so that I could then decide it at this point. I am not doing something right off the cuff.

THE COURT: We will take a short recess and I

I think on the testimony of Officer Palm, that the defendant was driving this Avis truck out of control to the point where he almost collided with a pillar of the elevated subway, railroad, he certainly was justified and well within his rights to stop him and to interrogate him. Certainly at the very least, to ask whether he had a license, to ask for the registration, to ask for papers showing that he had indeed rented this car. And, when he saw that he had a learner's permit, let's assume it was a valid license, but no registrations of a reasonable man even to the point of giving him probable cause then and there perhaps to arrest him. But, at the very least it gave him probable cause to make deeper interrogation.

When he asked what was in the truck, the

defendant consented to opening the truck to show him what was in the truck. I see no basis for suppressing anything there. And, when he found in the truck the coffee was there, he certainly had a basis, it seems to me, on all of those facts, to take them into the police station for further interrogation and once he learned that the goods had been recently stolen, under the ancient principle that a person in possession of recently stolen goods is presumed to know that they are stolen, he had more than ample cause to arrest him and to confine him, which he did.

So, I see no taint attaching from that original stop, from the interrogation, from that initial search and, indeed, from the arrest and detention which followed.

All right, what is your next point? Now that the props are out from under the taint argument, what is your next one?

As I go through it, and the officer in that connection was aware before he opened it, because the driver told him there was coffee in the truck, so he had a right to check that out to see if it was coffee. It could have been dope with the driver going so recklessly that he almost hits a pillar and with no proof of ownership. He certainly had a right to check that out with the man's consent.

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What is your next point now? It seems to me your whole argument here is premised on the taint. Am I right or wrong?

MR. CARROZZA: Actually, Judge, that is partially correct, but there is still the situation that arose where for the first time we find out that in the, for instance, the search of the Hermany Avenue address that the Government agents were upon that property, within the property of the house before any questioning of Mr. Hoffman and subsequently Mr. Tortorello before the execution of any consent.

THE COURT: Let's be specific now. What is your evidence? How do you establish that?

MR. CARROZZA: Agent Hay said while he was attempting to go int the house, anoter agent had gone into the back, had looked into the garage, come out and told him --

THE COURT: He said he didn't know how he found out. He said the agent came out and told him the coffee was in the garage.

MR. CARROZZA: That's right.

THE COURT: I queried him on that, as I recall,

Agent Hay, and he didn't know. He didn't know from beans

how the other agent found out how the coffee was there,

whether he looked through a window, whether he broke down

the door. He didn't know.

MR. CARROZZA: I was under the impression,

Judge, he said one of his brother agents had gone in the

back.

THE COURT: He knew he had gone to the back.

MR. CARROZZA: That brings him onto the property proper and into the yard. He testified some 60 or 75 feet distant from the building line where that garage was, and that is surely well within the property line. No question as to a mistake as to where the agent was. If my memory serves me, there was testimony where he said the agent said to him, "It's just where I thought it was."

The question is when did he tell him that.

The point is, when Ageng Hay entered the the building, one of his brother agents he knew had already gone onto the the property. They weren't there for the purpose of making an arrest. They were there to investigate.

Now, coupled with that, he also testified that he told Mr. Hoffman and Mr. Tortorello that he had other information about where the coffee was. Assuming that to be true, and there is no way for us to contradict that, he had one week from the time of the arrest of these defendants and the time he searched that house, to obtain a

search warrant.

THE COURT: There is no question in my mind that they had enough time to obtain a search warrant. That isn't the problem. The problem is whether they were within their rights, whatever search they did without one. There isn't any question they didn't have one.

All right, Mr. Garnett.

MR. GARNETT: Firstly, your Honor, there was no obligation on the agents to secure a search warrant before they went to the premises. From the testimony, Agent Hay testified that another agent accompanied him to the front door and two agents retreated to the rear of the building.

THE COURT: Why?

MR. GARNETT: There was no testimony adduced.

THE COURT: The burden is on you to show there is a valid search here.

MR. GARNETT: My argument on the validity of the search is that the defendants both executed consents to search.

THE COURT: What right does the agent have back in that garage, trespassing on somebody else's property? What right?

MR. GARNETT: No right to trespass, your Honor,

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but from the testimony there was no trespassing.

THE COURT: Isn't that an invasion of the property?

MR. GARNETT: From the testimony, there was no statement by Agent Hay that an agent had violated the premises by entering the garage. There is also an exhibit which shows that there are several windows missing from the garage. There is no apparent reason why one could not look into the garage without --

THE COURT: But what right does he have to go on my property? Can you go on my property and look into the garage?

MR. GARNETT: Under the circumstances, your Honor, there may have been a technical trespassing -THE COURT: Under any circumstances.

MR. GARNETT: However, I don't see that invalidates --

they weren't going to arrest. There is no proof of that. What right do they have to go on to the back of that property, go snooping into my garage or anybody's garage?

MR. GARNETT: None whatsoever, your Honor.
THE COURT: Isn't it illegal then?

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MR. GARNETT: There was no search, your Honor, except pursuant to the consent to search which had been executed each separately by both defendants. In so far --

THE COURT: Let me ask Mr. Carrozza.

Assuming that the agent had no permission to go on the property, what right do the defendants have to object to that? What standing do they have? It's not their property.

MR. CARROZZA: The fact, Judge, that the seized articles will be offered in evidence against them obviously, gives them standing to object because based upon what they saw, realistically what they saw in that garage and the conversations Mr. Hay had with Mr. Hoffman and with Mr. Tortorello, that we have seen the stuff in the garage, we can get a warrant, all of this together, Judge.

THE COURT: Do you admit you owned the property?

MR. CARROZZA: Absolutely not.

THE COURT: Then what standing do you have?

It is not your property. Your own witness testified that it is not his real estate, that he doesn't rent the garage, doesn't lease the garage, that it is his father-in-law's garage. What standing do you have? It's not your property, and it's not either the personal property in

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the garage, the coffee or the garage or the premises in any way. What standing do you have?

MR. CARROZZA: That the eventual result of the search and trespass would be to the detriment of the defendants and that gives them --

THE COURT: You mean if somebody trespasses -if a thief takes some property and hides it in my garage, my garage, and an officer comes along and goes in my garage, violates my rights and goes in my garage and takes that property, that the thief can object?

MR. CARROZZA: No, I don't think that's the same circumstance we have here.

THE COURT: How does it differ?

MR. CARROZZA: The difference here is that you do have a tenant in that building. Mr. Hoffman is a tenant in that building. The request made to him later on would --

THE COURT: Forget that. Later on we will deal with later on.

MR. CARROZZA: Mr. Hoffman being a tenant in that property, on the first floor apartment, with his father-in-law living above, would have a perfect right to object to anyone going into the yard.

THE COURT: Why?

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MR. CARROZZA: Because, Judge, there happens to be a door, we have testimony, which exits in that yard If he had a right of privacy --

THE COURT: If he has a right of access to the Does he? yard.

MR. CARROZZA: There is a door leading --THE COURT: Does he have any possessory right, caess to the garage?

MR. CARROZZA: I didn't say he did, but he has access to the yard.

THE COURT: All right, if he has access to the ...yard, that's a close question. I want briefs on that, the validity of that search, by three o'clock tomorrow afternoon.

All right, let's take it up from there. Now we go in the house, and he gets consent, right, to "Search my premises".

MR. CARROZZA: Meaning Mr. Hoffman?

THE COURT: "My premises" is what the exhibit You concede that, the consent.

MR. CARROZZA: Yes.

THE COURT: So why is the garage part of the premises?

MR. CARROZZA: I say, Judge, the garage is not

1	ps14 A 116
2	part of the premises.
3	THE COURT: Why not?
4	MR. CARROZZA: It's a separate and distinct
5	building. It's not part of his apartment.
6	THE COURT: You say the yard is part of his
7	premises, but the garage in the yard is not. Is that your
8	position?
9	MR. CARROZZA: Absolutely.
10	THE COURT: Why? What's the evidence?
11	MR. CARROZZA: Again, he does not have rental
12	privileges to that garage. We have to assume he does to
13	his apartment, which he says he rents. Now, when he gives
14	consent to search his apartment
15	THE COURT: He doesn't give consent to search
16	his apartment. He gave consent to search his premises.
17	That's what the document says.
18	MR. CARROZZA: Judge, the fact that that
19	document is prepared by the Government
20	THE COURT: What do you say that document
21	means? His premises?
22	MR. CARROZZA: That's why I questioned Mr. Hay.
23	I asked him whether he restricted
24	THE COURT: What do you argue it means?
25	MR. CARROZZA: I say it's a consent to search

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only the particular apartment. That's the only authority he could give, as to his apartment.

THE COURT: No, he could give authority to search over anything he has possessory or dominion, including the coffee in the garage.

MR. CARROZZA: If he has possessory interest, yes. But he had no access to the garage.

THE COURT: He said he went into the garage from time to time. He didn't park his car there, his car was too big, he kept it out on the street. Wasn't that the testimony?

MR. CARROZZA: That doesn't create possessory interest, though, Judge.

THE COURT: He has a right to access.

MR. CARROZZA: He said he was there from time to time. I don't know whether that gives him the right any time he wants. Even once a month --

THE COURT: I think we could fairly infer he could go in there any time he wants. He didn't limit it.

Assuming he does have the right to go in there any time he wants, is there anything wrong with it then?

MR. CARROZZA: No, if he had a right to go into it, the consent would cover, but I think we can't lose sight of the fact the manner in which the consent was

obtained also.

THE COURT: All right, but it's in the garage.

It seems to me you're in the horns of dilemma, it it isn't his garage, he has no possessory interest, no dominion over it, then what standing have you got even to object?

MR. CARROZZA: The reason I offered before,

Judge, the fact that the agent going into the yard -
THE COURT: No, no, this is different now.

This is after he has consented. He consents, and conseruing it your way, there is no consent by him to go into the garage. That's what you're saying, right?

MR. CARROZZA: Right.

THE COURT: It's not his garage, you say, no consent. He is consenting to go into his father-in-law's garage. What standing has he got to object to somebody going into his father-in-law's garage with his consent? The father-in-law isn't objecting.

MR. CARROZZA: The father-in-law never consented either.

and the cops come to me and say, "Look, we want to look into Carrozza's garage, if he's got the peanuts he stole the other night", and I say "Sure, go ahead". I consent and you don't object. What's wrong with it?

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MR. CARROZZA: You are assuming there was no objection. No consent by the same token in your example --

THE COURT: I consent, go on into the garage, and you don't object. That's all right, isn't it?

MR. CARROZZA: I would say so, yes.

THE COURT: All right. Now you say that that isn't the case because he didn't consent to going into the garage.

MR. CARROZZA: That's right.

THE COURT: What do you say?

MR. GARNETT: Merely that he did consent, your Honor. We have an exhibit that has been offered.

THE COURT: How does it go on my premises?

The evidence before me is that the garage is rented by his father-in-law.

MR. GARNETT: I'm not sure I understand your Honor's comments.

testified, Hoffman testified, I don't own the garage, I don't keep my car in it, it's my father-in-law's garage. I consented to search my premises. The garage is not part of my premises. That's his argument.

THE GARNETT: I can only say, your Honor, the

2 facts and circumstances at the time --

THE COURT: Come on, quit the bull. What facts, what circumstances?

MR. GARNETT: Their conversations with Mr. Hoffman as to what his premises were.

THE COURT: What did he say?

MR. GARNETT: He informed him that they would let him into the garage but not into the basement because that was not his premises, so the understanding according to Mr. Hoffman was that he himself had authority to allow the agents look into the garage, which he did. The agents at that time operated on the assumption that the garage was his premises or a part of his premises or that he had access to the garage.

THE COURT: I want a brief on that point by three o'clock tomorrow.

MR. CARROZZA: Yes, Judge. With respect to the consent signed by Mr. Tortorello and for that matter, if I can direct my remarks to Mr. Hoffman also, in both situations prior to the signing of those consents, we have testimony from Agent Hay that he apprised these defendants he could get a warrant, that it was available to him.

Now, under those circumstances, a signing of a consent of

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this type, I think surely brings you within the problems that were brought forth in Brown against State of Illinois. I'm sorry I don't have the citation. It was decided by the United States Supreme Court, June 26, 1975, but I don't have the official citation. I think it is in point with this situation that if you have a person, even though it's in custodial or a non-custodial situation and the coercion lends itself because of the suggestion that a warrant is available, and there are police officers, in this situation FBI agents that the consent here was not freely given and that's my argument, Judge, under these circumstances the consent signed by Mr. Tortorello surely after being questioned for at least a half hour according to Agent Hay and longer than that, maybe three-quarters of an hour according to Mr. Tortorello, somewhere between that, in an automobile with three or four agents where there was a question that we can get a warrant; if you don't let us, we can get a warrant, otherwise sign the consent, and we'll search, and you have the signing of the consent under those circumstances. I think that surely is coercion.

THE COURT: Does the case hold that?

MR. CARROZZA: Yes, Judge. Not specifically
that but --

THE COURT: What does it say? Can you quote?

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he?

MR. CARROZZA: I can only read from the very last paragraph. I'm sorry, I just can't find the exact quote but I submit, Judge, if I had time to read it over again, I could.

THE COURT: You contend the case holds if an agent told me let me search or I can get a warrant and I can do it --

MR. CARROZZA: That's part of it.

THE COURT: But he was in his own home, wasn't

MR. CARROZZA: No, he wasn't, Judge. He had

been summoned --

THE COURT: Hoffman was in his own home.

MR. CARROZZA: Hoffman was, yes.

only confuse them, confuse analysis of them. Let's stay with Hoffman and then we'll take up Tortorello.

Hoffman was in his own home. Two agents come to the door. The door is open, the wife is taking out the garbage. They go on in. What is coercive?

MR. CARROZZA: At that point there was nothing coercive.

THE COURT: They say we want to look at the garage, we want to look at the basement, we want to look

here. He says you can't look at the basement, I don't have access to that, you can't look there, I don't have access to that. They don't ask about the garage. He gives them consent, and they are telling him if you don't want to consent, we will get a search warrant, or words to that effect. You say that's coercive?

MR. CARROZZA: Yes, sir.

THE COURT: What about it?

MR. GARNETT: I would say it is not. I have not reviewed the authority cited by counsel.

THE COURT: Why not?

MR. GARNETT: I have just been apprised of that authority. Secondly, your Honor, I'm not so sure the decision of 1975 was retroactively applied to include a --

THE COURT: I want a brief whether that was coercive, by three o'clock tomorrow afternoon. Everybody is going to have a nice evening work but me.

Let's take Tortorello now.

MR. CARROZZA: The Tortorello situation, Judge, is substantially the same except he is sitting in an automobile, a Government vehicle, which --

THE COURT: How does he get into the automobile?

MR. CARROZZA: He was brought into the automobile by Agent Hay. He --

THE COURT: How did he come in contact with Agent Hay? I don't remember this evidence.

MR. CARROZZA: Mrs. Hoffman called her brother at the request of Agent Hay and there was testimony to that effect, and asked him to come over.

Avenue at which point he was met by Agent Hay and the other Government agents. Agent Hay said in order to keep them separate, we took Mr. Tortorello and put him in one of our vehicles and whether he was physically put, but he eventually found his way into the Government vehicle. We can assume he didn't say "Let's go sit in your car."

THE COURT: It would be awfully nice if the FBI knew how to apply for a search warrant. We would save about 20 hours of this Court's time. It's incredible bungling, but let's go on.

MR. CARROZZA: Under these circumstances, under the same type of interrogation, same type of questioning that they had given him once before, but now they're telling him, we can also get a search warrant of the premises. He said he doesn't own the premises but according to Mr. Tortorello there was an additional conversation concerning the warrantat which point he signed a consent

and they went into the basement to search, and that is substantially the position I took with respect to Mr. Hoffman, that if there is that type of coercison, namely we can get a warrant, why tell a defendant or a potential defendant we can get a warrant.

THE COURT: Why not go and get one?

MR. CARROZZA: Why are you telling him that except to say to him, if you don't sign it, we'll come back here anyhow, so why not sign it. There is coercion under those circumstances. Giving the Miranda warning and signing of the statement, I don't think takes the coercion out of the picture completely.

THE COURT: What do you say? Same argument, I suppose.

MR. GARNETT: Same argument, your Honor.
THE COURT: Same ruling.

Briefs by three o'clock. Put your facts together on it and I want an argument to come to heads on it. Some cases. Not a million cases. One or two.

MR. CARROZZA: Does your Honor want us to argue or just submit that?

argument. It would be my hope to decide this case not later -- the reason I want three o'clock briefs, I want to

cite it by tomorrow, by five o'clock, and I would like your here and I would like you here and I will hand down a decision from the bench tomorrow at five o'clock. We got a trial coming up next Tuesday, if I don't suppress this, I'm sure. Maybe even if we do.

Are there any more points?

MR. CARROZZA: One other point. There is a statement attributed to Mt. Hoffman, which i have a copy, given to me today, your Honor must have seen it, based upon a conversation had with Mr. Hay on September 11th. At that time Agent Hay testified that there was no giving of any Miranda warnings at that time, prior to that statement being taken.

Now, I would submit, Judge, that the last time he had seen him prior to September 11, was April 30th and he had allegedly given the Miranda warnings then. Surely those Miranda warnings would not carry over for a period of five months. I submit that they were dutybound to give him warnings, particularly since that's probably the only incriminating statement made by Mr. Hoffman because if there were others, we would have had a Bruton situation on earlier conversations but that seems to be the only one to give rise to it. That would have to be the only incriminating statement.

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THE COURT: What about that? You concede -MR. GARNETT: Yes, your Honor.

THE COURT: Why five months later can you take a statement without giving somebody Miranda warnings?

By now you have focused on him pretty well. Is it because he couldn't remember them or he didn't have his card with him?

MR. GARNETT: He did not advise him of his rights, your Honor. He went there for the purpose of having Mr. Hoffman identify some photographs. This was prearranged. During that interview when Mr. Hoffman was identifying photographs of other persons assuming that that purpose was to identify persons who had delivered the coffee to him, he made that gratuitous statement to Agent Hay. I don't believe that there was an obligation at that time for Agent Hay to close his ears to that statement.

THE COURT: Brief that by three o'clock.

Again, facts showing that he did volunteer it and all that you say. Back it up.

Anything else?

MR. CARROZZA: I would just like to say that the statement made by the Assistant U. S. Attorney, I feel is also a gratuitous statement he seeks to offer because I

don't remember any testimony from --

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THE COURT: That's why I told him to back it up with facts. I'm telling you the same thing. I don't want to see a lot of bull. There is a record here. Get the transcript so that you know what you are talking about. In other words, pretend you're in the Court of Appeals and give me some kind of chance to make an intelligent ruling on it.

I want to ask you the \$64 question:

Can you go to trial on Tuesday if the Court

MR. GARNETT: No, your Honor.

THE COURT: What are you going to do, nolle

the case?

suppresses?

MR. GARNETT: Probably. The only basis is

the --

THE COURT: There is a confession. There is a story that you took.

MR. GARNETT: Standing alone, your Honor, I don't believe we have --

THE COURT: That's something I want to know because we planned to go to trial on Tuesday.

MR. GARNETT: I thought it was Wednesday, your Honor.

THE COURT: Tuesday, wasn't it?

MR. CARROZZA: I was told the 3rd. That's what I had written in my diary.

THE COURT: It's the third. But we need to know if you can get your witnesses.

MR. GARNETT: I'm prepared, your Honor.

THE COURT: I don't want them coming if there is going to be no trial. I will rule tomorrow at five o'clock if you get those briefs in on time.

MR. CARROZZA: Judge, will the defendants be required to be present tomorrow or are they excused tomorrow?

THE COURT: If they can waive their right to be here, if they wish.

Do they want to waive it?

MR. CARROZZA: They are working, Judge. May I put on the record -- Mr. Tortorello, do you waive your appearance here tomorrow afternoon, the continuation of this hearing?

MR. TORTORELLO: Yes.

MR. CARROZZA: How about you?

MR. HOFFMAN: I do.

THE COURT: You have a right to be here, if you wish. Now that you have both waived, you need not come.

MR. CARROZZA: The bail continues, please, sir?
THE COURT: Bail continues.
MR. GARNETT: Thank you, your Honor.

SOUTHERN DISTRICT COURT REPORTERS. U.S. COUNTHOUSE

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United States of America

vs.

75 Cr. 730

Frank Hoffman and Dominic Tortorello

New York, New York. August 27, 1975 - 5:10 P.M.

THE COURT: Let the record note your appearance.

MR. GARNETT: Ronal Garnett, Assistant United States Attorney for the Government.

MR. CARROZZA: Joseph R. Carrozza, attorney for both defendants.

Let the record reflect yesterday they consented to their non-appearance, with the consent of the Court.

THE COURT: The Court has very carefully considered the testimony of the witnesses, the exhibits, the arguments of counsel, orally, at the conclusion of the motion yesterday, the written briefs which I now have studied for an hour, and the authorities pertinent to the decision (f this motion.

And, the Court is convinced that the search in the garage and basement on April 30, 1972, was illegal and that the contraband seized must be suppressed.

The Court is also convinced that any statements taken from either defendant on that date and after that date are tainted by that illegality, and should be suppressed.

The Court has not taken the time or had the time fully to expound its reasons in detail for reaching these conclusions. If the Government intends to appeal, I would like it to notify me within 24 hours, in which case I will make written findings and written conclusions of law, but I would like to be spared that effort if on reflection you agree with my ultimate conclusions here.

I don't know what that leaves in this case except the statements that were taken in the police station, which I refused to suppress yesterday.

That's it.

Please advise menot later than five o'clock tomorrow or --

MR.GARNETT: Your Honor, I will confer with my superiors now.

THE COURT: As soon as you can, because I would like to get at it while it is fairly fresh in my mind.

MR. CARROZZA: Is it my understanding despite

what the action is of the Government, that we will appear here on September 3?

THE COURT: Are we going to go to trial?

MR. GARNETT: Probably not, your Honor, with the suppression of the evidence which removes the annexus of the charge which is the coffee.

Obviously I can use the time for other purposes.

MR. GARNETT: Certainly.

MR. CARROZZA: Thank you very much.

(Time noted 5:13 P.M.)

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United States v. Frank Hoffman and Dominic Tortore 16.

SEP 3 1975

## 75 Cr. 730

Following a lengthy evidentiary hearing and careful consideration of the arguments and briefs of counsel, we find that defendants arrest or April 25, 1973 by the New York City Police Department was valid and that the defendants were fully advised of their and trights before being questioned. Thus any Miranda rights before being questioned. Thus any statements made by them on April 25 & 26, 1973 are

The Court further finds that the warrantless admissible. search and seizure of evidence from the garage and basement at 2258 Hermany Ave, Bronx, was illegal because it admittedly resulted from and was tainted by, the exploitation and coercive use of information obtained by an unlawful trespass, which vitiated the purported consents. All such evidence must therefore be suppressed. Any statements made by defendants on or after April 30, 1973 were tainted by the illegality and coercive exploitation of the search and seizure, and therefore must See McDonald v. United States, 335 U.S. 451 (1948); Wong Sun v. United States, 371 also be suppressed. U.S. 471 (1963); Schneckloth v. Bustamonte, 412 U.S. 218 (1972); Brown v. Illinois, \_\_ U.S. \_\_, 43 U.S.L.W. 4937

(June 26, 1975).

Accordingly, defendants' motion to suppress is granted to the following extent:

1/ All physical evidence seized on April 30, 1973 at 2258 Hermany Ave., Bronx, N.Y. 2/ All statements of either defendant made on or after April 30, 1973.

In all other respects, the motion is denied.

So ordered

Dated: August 29, 1975 New York, N.Y.

LLOVD F MOCMAHON

LLOYD F. MacMAHON United States District Judge MICROFILM

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

#43399

UNITED STATES OF AMERICA,

75 Cr. 730-LFM

-37-

MEMORANDUM

FRANK HOFFMAN and DOMINICK TORTORELLO,

Defendants.

S. D. OF N.

MacMAHON, District Judge.

The United States moves under Rule 9(m) of the General Rules for the Southern District of New York for meargument of this court's decision, dated August 29, 1975, granting defendants' motion to suppress certain evidence in this case under Rule 41(e) of the Federal Rules of Criminal Procedure.

Rule 9(m) provides that a notice of motion for reargument shall be served within ten days after the filing of the court's decision on the original motion. In this case, the government's notice of motion to reargue was not served until four weeks after our original decision was filed. The initial question is, may this

court consider the motion despite its untimeliness.

The enlargement of a specified time within which to do an act is governed by Rule 45(b) of the Federal Rules of Criminal Procedure. When the time period has already expired, the court, in its discretion, may permit the untimely act to be done if the delay was the result of "excusable neglect." We must determine, therefore, whether "excusable neglect" prevented the government from adhering to the ten-day limitation for the making of this motion.

When we announced our decision on the motion to suppress, we asked the Assistant United States Attorney to inform us within twenty-four hours whether the government would appeal. We made this request to avoid the necessity of making written findings of fact and conclusions of law should the government, upon reflection, agree with our holding. On August 28, 1975, we were informed that no appeal would be taken.

The United States asserts on this motion that, when it informed us of the decision against appeal, it had proceeded without knowledge that the United States Attorney's office, under its delegated authority from

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the Department of Justice, could not decide against appealing from our original decision without the approval of the office of the Solicitor General. Such approval had not been sought.

Anyone with any experience in government knows that such slips are more the rule than the exception. We think, however, that it does not excuse the government's failure to move within the required time. Accordingly, we must deny the motion to reargue as untimely.

It appears, however, that the United States has filed a notice of appeal from our decision granting defendants' suppression motion. In view of the appeal and our discovery that we erred in suppressing some of the evidence, we believe it might be helpful to the Court of Appeals if we state our findings of fact and conclusions of law at this time.

Defendants Hoffman and Tortorello were indicted on July 23, 1975 and charged with knowingly receiving approximately 250 cartons of stolen coffee, moving in interstate commerce, with a value in excess of \$5,000, in violation of 18 U.S.C. § 2315.

officer Palm of the New York City Police Department testified that on April 25, 1973, while patrolling in Brooklyn, he saw both defendants in an Avis rental truck. He observed that, as the truck was turning a corner, it almost ran into a pillar of the elevated subway, and he therefore ordered the driver, defendant Tortorello to pull over.

. Palm asked to see Tortorello's license and the truck registration. Tortorello produced a validated learner's permit, equivalent to a driver's license, but said that he did not have the truck registration nor the rental agreement. Palm then asked what was in the truck, and Tortorello replied that it contained coffee. When asked to produce a bill of lading or some other proof of ownership of the coffee, Tortorello responded that he had none. Palm then asked him to open the back of the truck, which was completely enclosed. Tortorello complied and exposed approximately 50 cases of coffee. At this point, the defendants were brought to the station house, where an investigation revealed that the coffee was part of a shipment which had been hijacked a few days earlier. The defendants were then placed under arrest.

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The next day, April 26, 1973, Agent Hay of the FBI spoke with the defendants at the Brooklyn House of Detention. Each defendant was advised of his constitutional rights and executed an advice of rights - waiver of rights form (Government's Exhibits 1 and 2) before making any statements. Sometime thereafter, the defendants were released.

On the morning of April 30, 1973, Hay and three other agents went to a two-family house located at 2258 Hermany Avenue in the Bronx. Defendant Hoff-man occupied the first floor apartment and Tortorello's parents occupied the second floor. Initially, the agents merely intended to question Hoffman about the hijacked coffee, but while Hay and one agent went to the front door, the other two agents went down the driveway to the back of the house. There, one of the agents looked into the garage through some broken windows and saw about 50 cartons of coffee. He immediately reported this to Hay, who was still at the front door.

Hoffman answered the door and allowed the agents to enter his apartment. Hay advised him of his rights, but Hoffman refused to sign a waiver form (Government's Exhibit 5). Hay told Hoffman that he wanted to search the house, that he believed he had sufficient information to obtain a search warrant, and that the agents had seen coffee in the yarage. Hoffman signed a consent to search form (Government's Exhibit 7), which authorized the agents to "conduct a complete search of my premises. . . "

The search of Hoffman's apartment revealed nothing. Hoffman and the agents then proceeded to the garage. The agents asked for permission to enter the basement, but Hoffman said that he had no authority to let them in the basement. Hay then directed Hoffman's wife to telephone her brother, defendant Tortorello, and tell him to come to the house.

When Tortorello arrived, he was placed in a car with three agents, advised of his constitutional rights, and executed a waiver form (Government's Exhibit 6). Hay told him the agents wanted to search the basement, that he had sufficient information to obtain a search warrant, and that the coffee in the garage had already been found. Tortorello then executed a consent to search form (Government's Exhibit 8).

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Inspection of the basement revealed more than 200 cartons of coffee, which were removed by the agents along with the coffee in the garage.

On May 18, 1973, Tortorello went to the FBI office in Manhattan, where he was questioned after he had executed a voluntary appearance, advice of rights — waiver form (Government's Exhibit 9). From that time until the filing of the indictment in this case, he had no further contact with federal authorities.

On September 11, 1973, Hay returned to the Hermany Avenue house, talked to Hoffman but failed to warn him of his rights. From that time until the filing of the indictment in this case, Hoffman had no further contact with federal authorities.

Defendants moved to suppress the coffee seized from the Hermany Avenue address, as well as all statements made by them to federal authorities. We held an evidentiary hearing on August 26, 1975, at which the foregoing facts were established.

Defendants' first contention is that the actions of Officer Palm, in searching and stopping the truck, were illegal because he had acted without probable

cause to believe a crime had been committed. It is asserted that the subsequent investigation by the FBI, resulting in the seizure of the coffee which forms the basis of the indictment, was tainted by this illegality and, therefore, this evidence should be suppressed. We disagree.

Officer Palm acted well within his authority in stopping the Avis truck after observing that it was being driven in an erratic manner. Furthermore, when the driver could produce only a validated learner's permit and no registration or rental agreement, Palm had sufficient cause to inquire into the nature of the cargo.

Again, when defendants were unable to produce proof of ownership of the coffee, the officer properly requested that the back of the truck be opened. The totality of the circumstances show that Tortorello voluntarily consented to the inspection of the truck. The defendants were not placed under arrest until the police had reliable information that the coffee had been stolen. Therefore, no taint arose from Palm's actions to poison the subsequent investigation.

Nor is there a basis for suppressing the statements made by defendants to Agent Hay in the Brooklyn

House of Detention on April 26, 1973. Each was fully informed of his rights and executed waiver forms.

We held that the remainder of the challenged evidence must be suppressed because the method of the search at the Hermany Avenue address was unlawful. Illegality stemmed from the agents' trespass into the back yard of the property and their unauthorized search of the garage before any consent had been obtained.

In McDonald v. United States, 335 U.S. 451

(1948), the Supreme Court suppressed evidence, seized by FBI agents, who, without a warrant to search or arrest, broke into a boarding house, looked through the transom of defendant's rcom, and observed defendant using the challenged articles in the operation of a lottery. In the absence of exigent circumstances, a warrantless search and seizure violates the Fourth Amendment.

In Coolidge v. New Hampshire, 403 U.S. 443

(1971), this proposition was stated in more stringent terms when the Supreme Court held that warrantless searches and seizures were "per se unreasonable under the Fourth Amendment -- subject to only a few specifically established and well-delineated exceptions."

The case of <u>United States v. Sokolow</u>, 450 F.2d 324 (5th Cir. 1971), is similar to the present case. A police officer, while arresting defendant on his property, saw air conditioners stacked in the garage. He entered the garage without a search warrant and copied down the serial numbers. This information established that the air conditioners had been stolen. The Court held the search and seizure of the serial numbers illegal since no exigent circumstances existed to compel the officer to enter the garage.

There were no exigent circumstances here. The two agents who went to the rear of the Hermany Avenue house were mere trespassers. The act of looking into the garage was a warrantless search, and there is no claim that exigent circumstances existed at the time. The agents had sufficient information to obtain a search warrant at least four or five days before they went to the Hermany Avenue house on April 30, 1973. Indeed, there was no attempt whatever to assert at the hearing a valid reason for the failure of the FBI to obtain a search warrant. Therefore, this search was unreasonable.

There remains, however, the question of ing on the part of defendants to object. We spectly requested the parties to address this point in hearing memorandum. The government's memorandum that both defendants had standing under the "autostanding" rule of Jones v. United States, 362 U.S (1960), that is, in a criminal prosecution in whis session is an essential element of the crime, a dant automatically has standing to raise Fourth Amobjections to seized evidence. This rule was for to prevent the government from taking the contradiposition that, while a defendant lacks sufficient sessory interest to challenge the evidence, he, retheless, may be convicted of a crime for which position of that evidence is an essential element.

The crime with which these defendants a charged, receipt of stolen merchandise, has, most tainly, as an essential element, the possession of challenged coffee. Therefore, without independent search, we accepted the government's concession fendants' standing. It now appears that we were led into error.

The case of Simmons v. United States, 390 U.S. 377 (1968), held that the testimony of a defendant at a suppression hearing could not be used against him at trial over his objection. This prevented the government from taking the contradictory position condemned in Jones, because now a defendant could testify to his interest in the challenged items without fear that his admission would later be used against him at trial.

The implications of the foregoing cases were discussed in <u>United States</u> v. <u>Price</u>, 447 F.2d 23 (2d Cir. 1971), <u>cert. denied</u>, 404 U.S. 912 (1971). There, defendant Price was charged with the receipt and possession of stolen copper wire. The trial court found that Price lacked standing to challenge the search of the building where the wire had been found, because he asserted no interest in the wire or the building at the suppression hearing, was not present at the time of the search, and was not charged with possession at the time of the search. The Court of Appeals noting that <u>Simmons</u> "explicitly reaffirmed the automatic standing rule of Jones," reversed Price's conviction holding that under <u>Jones</u> he did have standing since possession was an essential element of the crime.

Furthermore, the court expressly rejected the notion that Price lacked standing because of the temporal difference between the crime charged and the search and seizure of the challenged evidence.

Two years later, in <u>Brown v. United States</u>, 411 U.S. 223 (1973), the Supreme Court reassessed the criteria for standing and formulated a standard which embraced a more limited reading of <u>Jones</u> and <u>Simmons</u>. According to <u>Brown</u>, a defendant lacks standing to contest a search and seizure where he: (a) was not legitimately on the premises at the time of the search; (b) alleged no proprietary or possessory interest in the premises searched or the property seized; and (c) was not charged with a crime that includes, as an essential element, possession of the seized evidence at the time of the search and seizure.

Here, defendants were charged with receipt of the stolen coffee on or about April 23, 1973. The search and seizure complained of occurred a week later, on April 30, 1973. Thus, defendants are not charged with a crite wherein possession at the time of the search and seizure is an essential element. Therefore, neither defendant has standing under the Brown third criterion.

Whether Hoffman or Tortorello fit any of the other criteria requires separate consideration of each defendant.

Defendant Hoffman does have standing to challenge the seized evidence. He was a tenant in the Hermany Avenue house. The driveway runs at the side of the house, and there is a doorway at the rear of Hoffman's apartment which opens on the area around the garage. While Hoffman stated that he did not use the garage to park his car, he also stated that he did have access to it.

In Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974), the defendant lived in a house containing four separate apartments. The court held that the defendant had standing to object to evidence seized in the back yard by a police officer without a warrant. The protection of the Fourth Amendment extends to the "curtilage" of one's abode if it comprises an area in which the individual has a reasonable expectation of privacy.

Here, there can be no question that the area into which the FBI agents trespassed was part of the curtilage of Hoffman's home and that he had the requisite expectation of privacy with respect to the garage.

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Therefore, Hoffman had a sufficient proprietary or possessory interest in the premises searched to give him standing under Brown.

It might be argued that Hoffman's consent to the search of his premises attenuated the taint of the initial illegality of the search. However, before Hoffman signed the consent form, Hay told him that the agents had already seen the coffee in the garage. Thus, the initial illegality was exploited to obtain Hoffman's consent without any attenuation. Likewise, the later seizure of the coffee from the basement and the statements made by Hoffman on April 30, 1973 and September 11, 1973 led directly from the illegal search of the garage, without the intervention of any "purging event." Therefore, this evidence must also be suppressed as against defendant Hoffman.

Defendant Tortorello does not have standing 10 to object to the search of the garage. Although he lived at the Hermany Avenue address until he was married and his parents still owned the house and occupied the second floor apartment, Tortorello stated that he had no proprietary or possessory into rest in

the premises on April 30, 1973. He testified that he no longer had a key to the house and claimed no interest in the coffee. Nor was he present at the time the garage was searched. Therefore, he fails to meet the criteria for standing established by Brown and cannot object to the seizure of the coffee from the garage.

Tortorello does have standing to object to the seizure of the coffee from the basement, since he was legitimately on the premises at the time the search was conducted. The government contends, however, that Tortorello consented to the basement search. Tortorello contends that, although he signed the consent form (Government's Exhibit 8), he did so under coercion.

on the facts and circumstances of each case. Here, although Tortorello had been placed in a car with three agents when he arrived at the house, there was no evidence that the agents in any way attempted to overbear his will. Tortorello admitted that he was asked only the same questions Hay had previously asked in the interview at the Brooklyn House of Detention. Hay's statement that the coffee in the garage had been found

was not the exploitative use of illegal conduct because 12 that evidence was not tainted as to Tortorello. Under all the circumstances, we hold that Tortorello's consent was completely voluntary. Therefore, the coffee seized from the basement is admissible against him.

The statements made by Tortorello on April 30, 1973 and May 18, 1973 were preceded by a complete reading of his constitutional rights and the execution by him of waiver forms. Therefore, these statements are also admissible against him.

It appears, therefore, that the suppression of the challenged evidence as against defendant Tortorello was error. We feel constrained to note that a considerable amount of time and effort has been expended and wasted by this busy court on this wholly unnecessary problem. Time will also be expended by the Court of Appeals. The burden could have been avoided if (1) the FBI agents had simply bothered to obtain a search warrant for the Hermany Avenue address, (2) the government had not conceded standing erroneously, or (3) the motion to reargue had been made within the permissible period. However, as matters now stand, the Court of Appeals is

the only proper tribunal to pass upon the correctness of our original decision.

Accordingly, the government's motion to reargue this court's decision, dated August 29, 1975, granting defendants' motion to suppress certain evidence, is denied as untimely.

So ordered.

Dated: New York, N. Y.

November 14, 1975

LLOYD F. MacMAHON

United States District Judge

#### FOOTNOTES

- Counsel for defendants has informed the court, by letter dated October 2, 1975, that he is relying upon our original decision and would not submit papers in opposition to the instant motion. From this, we do not assume that he waives objection to its untimeliness.
- It should be noted that the cartons of coffee on the truck were not involved in the instant indictment. Therefore, neither this coffee nor any statements made by defendants to the police were involved in the suppression motion.

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- See Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
- 403 U.S. at 454-455; Katz v. United States, 389 U.S. 347, 357 (1967).
- See United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975); United States v. Dye, 508 F.2d 1226 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975); United States v. Foster, 506 F.2d 444 (5th Cir. 1975).
- 6 447 F.2d at 29.

It is this third category of standing which modifies the Jones' "automatic standing" in this case.

8

### Katz v. United States, supra.

It was asserted by counsel for defendants that, since Hay failed to adise defendant Hoffman of his constitutional rights prior to the interview on September 11, 1973, there was a violation of the

September 11, 1973, there was a violation of the Miranda rule. However, it appears that this interview occurred at Hoffman's home and that there was no "custodial" factor present. Accordingly, this objection to the admissibility of this statement is meritless. See United States ex rel. Sanney v. Montanye, 500 F. 2d 411 (2d Cir.), cert. denied,

419 U.S. 1027 (1974).

10

Since we had originally accepted the government's concession of standing as to both defendants, we felt that the same considerations expressed above applied to Tortorello as applied to Hoffman. Now that it appears that the government was incorrect as to the "automatic standing" of Tortorello, we must consider his case in a totally different light.

11

Schneckloth v. Bustamonte, supra, 412 U.S. at 227; Brown v. Illinois, 43 U.S.L.W. 4937 (U.S. June 26, 1975).

12

This is similar to Wong Sun v. United States, 371 U.S. 471 (1963), in which certain evidence was inadmissible against defendant Toy because its seizure was the direct result of Toy's illegal arrest. However, the same evidence was admissible against defendant Wong Sun since its seizure was not an invasion of his rights.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

INDICIMENT

75 Cr. 750

FRANK HOFFMAN and DOM INIC TORTORELLO,

Defendants.

On or about April 23, 1973, in the Southern District of New York, FRANK HOFFMAN and DOMINIC TORTORELLO, the defendants, wilfully, knowingly and unlawfully did receive, conceal and store goods, wares and merchandise, to wit, approximately 250 boxes of canned Maxwell House coffee of avalue of more than \$5,000 which were moving as, and a part of, and constituted interstate commerce, knowing said goods, wares and merchandise to have been stolen.

(Title 18, United States Code, Sections 2315 and 2)

FOREMAN

PAUL J. CURRAN United States Attorney

#### AFFIDAVIT OF MAILING

) ss.: STATE OF NEW YORK COUNTY OF NEW YORK

JOHN D. GORDAN, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of January 1976, and appendix he served 2 copies of the within brief by placing the same in alproperly postpaid franked envelopes addressed:

> Irving Anolik, Esq. 225 Broadway New York, New York 10007

And deponent further says that he sealed the said envelopes and placed the same in the mailbox for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

19th day of January, 1976

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